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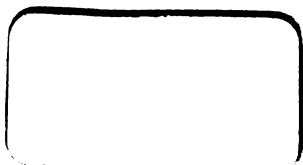
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A COMPLETE

Encyclopedia c

OF

Virginia Law

BEING

A Concise but Comprehensive Alphabetical Presentation of
the Present Common and Statute Law, Civil and
Criminal, of the Commonwealth

BASED ON

The Monumental Works of Dr. John B. Minor; the Works,
Brochures, and Notes of Judge Martin P. Burks and
Professors Charles A. Graves, William M. Lile, and
Raleigh C. Minor, and other Treatises, Text-
Books, Expositions, and Repositories of
Virginia Law, Modernized to Date by
Recent Virginia and other Decis-
ions, the Code of Virginia 1919,
and Subsequent Acts of
the General Assembly in-
cluding Acts 1922

WITH

Complete Practical Revised **FORMS** Adapted to the Present Law

BY
SAM^{uel} N. ¹⁸⁸¹HURST

AUTHOR OF

"Hurst's Guide & Manual," "Hurst's Annotated Virginia Digest" (9 vols.), "Hurst's
Annotated Virginia & West Virginia Criminal Digest," "Hurst's Annotated Virginia
Constitution," "Hurst's Form Book for Virginia Attorneys," "Hurst's Index and Direc-
tory of Virginia Law," "Hurst's Annotated Pocket Code of Virginia" (4 eds.), etc.

IN TWO VOLUMES

Volume I—A to G

PULASKI, VA., OR RICHMOND, VA.

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PREFACE

This is to introduce to you the 9th child (counting volumes and editions, the 24th and 25th or twin children) of our rather large legal family. Conceived many years ago, and matured and brought forth with much meditation, serious pondering in heart, patient anxiety, and arduous labor, this is the proudest product of a somewhat fruitful family tree, especially as four have become deceased or decrepid by the ravages of some thirty years, and only two remain in youthful vigor—the Form Book and the Pocket Code, the latter having four times, once every seven years (in 1898, 1905, 1913 and 1920), been rejuvenated by an age-healing bath in the fabled fountain of youth.

Need of This Work

The present confused state of the common and statute law of Virginia, owing to the absence of any comprehensive and systematic presentation of the corpus juris of Virginia since the days of John B. Minor, the famed Blackstone of Virginia, who some thirty years ago covered (by his last editions) the entire field of legal jurisprudence, law and equity, civil and criminal, in his four volumes (six books) of "Institutes" and his briefer work on "Crimes and Punishments,"—affords a sufficient apology for this undertaking, and makes the time opportune indeed for the realization of the dream of our younger manhood.

While this brief but complete "Encyclopedia of the Law of Virginia" is of course less pretentious than Minor's great monumental work, yet according to the measure of our humbler gifts we hope this may prove our monumental achievement in the field of law-authorship, where we have labored so assiduously for the past thirty years.

The Author and His Call

Schooled in the principles of the common law under that unexcelled teacher and scholar, Dr. John B. Minor; drinking deep at the fountain of judicial decisions—digesting and mentally assimilating every Virginia case as embodied in his nine-volume Digest and being a close student of subsequent Virginia case law; reading, pondering, comparing, collecting, and annotating the statutory law of the State, perhaps a dozen times; and, besides his works on criminal law and the constitution, etc., compiling a “Form Book for Virginia Attorneys”, which seems to have met with special favor with the profession, the compiler of this “Encyclopedia of Virginia Law” should not be wholly unprepared for the task. On this plea, and with twenty-five volumes of Virginia law to his credit, he asks the profession to pardon any seeming presumption in this greater undertaking. Though this work was conceived over fifteen years ago and has been in preparation several years, its appearance at this time is an answer to the personal call that has come up from the profession, saying, “For heaven’s sake give us something to clarify the legal skies in Virginia so we may really know or readily find the law of the State.”

Encyclopedic Treatment

For convenience in practice we believe the profession will concede that the encyclopedic form of treatment is the most modern and best. Since the initial advent of the encyclopedic style in that great pioneer work, the “American and English Encyclopedia of Law,” in 1887, this form of law-book production has experienced an ever-growing popularity. This “Encyclopedia of Virginia Law” is likewise the pioneer of this style of presentation in Virginia, and so far as we know in the United States; and as we were the first anywhere to produce a Pocket Code, so we do not hesitate to blaze the way through the untrodden forest of encyclopedic adventure. And note, that a State work like this, unlike the encyclopedias of a general nature, can be carried into the court with as much safety as it can be used at the desk, for it speaks with no babble of conflicting decisions, nor in sepulchral tones from

the tomb, but with a single voice the one clear and unmistakable message—the present living law of Virginia.

Scope and Nature of Encyclopedia

As stated in the title, this work is “a concise but comprehensive alphabetical presentation of the present common and statute law, civil and criminal, of the Commonwealth.” As to “pleading and practice”, while the rules of pleading are stated, and we treat the substantive side of pleading and practice, as to the adjective phase of pure common law pleading (for which we have the simpler procedure by motion), we merely refer to the works of Dr. John B. Minor or Judge Martin P. Burks, where these subjects are fully and ably treated.

This Encyclopedia, while full and complete in its treatment of subjects, seeks simply to present the nuggets of law apart from historical setting or learned discussion. As a legal prospector we explored the great mine of legal lore, and wherever we detected a silver, gold, or other valuable vein of pure and unalloyed law, we at once extracted it, and, after braying it in a mortar with a pestle and treating it in the crucible of analysis and classification, assigned it its proper setting in the encyclopedic galaxy. By thus acting the part of a careful legal prospector and assayer, and never duplicating a subject (but using cross-references instead), we have been able to compress the work into the present small compass. In no sense is this work a digest, which merely compiles the syllabi of the decisions on isolated points, and therefore is necessarily only a partial and incomplete presentation of the law, without any attempt (ordinarily) to note or reconcile apparently conflicting decisions or to give the law in the light of the present statutes. This Encyclopedia is not only encyclopedic but text-book in treatment, and gives a complete presentation of the subjects.

Statutory Treatment

To make the work complete as to the statute law of Virginia, we have embraced every subject contained in the Code and subsequent Acts; but subjects not of general interest

and utility to the profession, like many subjects in the first volume of the Code, are presented very briefly—sometimes by a mere reference to them, yet always noting the amendments of the sections to date. In treating purely statutory subjects that have never received judicial construction or text-book treatment, we have collected all the kindred statutes, distributed them under appropriate heads, and made pertinent observations thereon, so as to afford a clear, obvious, and comprehensive presentation of the subject, ready to the hand of the busy practitioner.

Comprehensive Nomenclature

Aside from the usual legal nomenclature, which we have used, covering the whole field of legal jurisprudence, we have added many interesting and more or less new headings, such as Animals, Fowls, etc.; Anti-Trust Law; Architect and Builder; Baggage; Cities and Towns; Delinquent Tax Sales; Employer and Employee (also embracing the "Workmen's Compensation Law"); Fraudulent and Voluntary Conveyances; Hotels, etc.; Licenses and License Taxes; Married Woman's Property and Other Rights; Minors, Infants, or Children; Real Estate Agent; Taxation and Tax Bill; Unincorporated Associations or Orders; etc., etc. A few times we have somewhat overstepped the proper scope of this work, but we will surely be excused for giving such practical and interesting subjects as Copyrights; Due Process of Law; Interstate Commerce Law; Labels or Prints; Patents; Pure Food and Drug Laws, and the like; and general utility closely allied to the law compelled us to include Parliamentary Law. To make the work as complete as possible we have descended even to the very minutiae of law. While we do not discuss (either with or without the prefix) mosquitoes or fleas, we do treat the equally impressive but more useful subject "Bees." And notwithstanding any possible political ambition, we have, "without the fear or favor of man", actually treated "Dogs"! and further 'to promote domestic tranquility,' we have stated the rights and duties of "chickens"!—concealed, however, under the more pacific heading, "Animals, Fowls, etc."

Complete Practical Forms

This Encyclopedia contains also, as stated in the title, "complete practical forms, common law and statutory, adapted to the present law." These are given at the end of the several subjects respectively. These forms are one of the most important features of the work, which embodies not only the relevant forms of "Hurst's Forms for Virginia Attorneys," carefully adapted to the present state of the law, but it also contains all the new, rare, and unusual forms recently collected by the author from the legal profession and other sources, and forms specially compiled by him under the new statutes (as, in case of attachments, search warrants, etc.), which were at first intended for a separate publication heretofore announced as "Hurst's Supplementary Forms."

Cross-Reference Index

Though the subjects are treated alphabetically under the common legal headings, yet to make the work quickly and easily accessible, we have appended a complete "Cross-Reference Index", in which is given almost every subject that may occur to a lawyer or even a layman, and which cites you at once to the heading desired. We believe the attorney will by this index and Encyclopedia find a statutory subject quicker than in an unduly elaborate but non-subalphabetical index.

West Virginia Edition

The Virginia and West Virginia law, common and statutory, being practically the same, this Encyclopedia will prove almost equally serviceable to the West Virginia practitioner; and we, therefore, have published a West Virginia edition.

The Author's Valedictory

Fully sensible that this Encyclopedia could have been made better by abler hands, perhaps where we have lacked in superior ability, we have made up in unexcelled industry and unsurpassed experience. With all its imperfections which a critical though charitable profession may detect, we are nevertheless absolutely confident this Encyclopedia will prove very

helpful indeed to the attorney as his desk and court companion in his every-day practice.

Profoundly gratefully to the profession for their generous patronage for the past thirty years, and pleading for this perhaps his last and proudest production, a like or even liker reception and appreciation—even hoping this work may find an important and permanent place among handy and useful tools in the lawyer's workshop; and humbly and sincerely thanking Almighty God for this high privilege of serving Him and humanity in an effort to present those "rules of civil conduct, commanding what is right and prohibiting what is wrong", whereby our citizenship may the better submit themselves to "the powers that be", which we are told, "are ordained of God",—the author begs in this last line to erect a stone in grateful remembrance of a great, noble, honest, and honorable profession.

July, 1922.

SAM N. HURST.

ABDUCTION

§1. Damages

§2. Criminal offenses

- (1) Abduction of children
- (2) Abduction to extort money
- (3) Abduction of lunatics, etc
- (4) Kidnapping as a slave
- (5) Abduction of females for marriage or defilement

§1. Damages.—A person is liable in damages for unlawfully taking or enticing away, or harboring a child, wife, husband or servant.

§2. Criminal offenses.—Abduction is also a criminal offense, as follows:

(1) *Abduction of children.*—For any one besides the father or mother illegally to seize, take, or secrete a child from its parents or other lawful custodian, is a felony. Punishment, penitentiary 2 to 5 years, or jail not exceeding one year and fine not exceeding \$1,000. (Code, §449.) Force is not necessary to this offence.

(2) *Abduction to extort money.*—To seize, take, or secrete any one with intent to extort money, or pecuniary benefit, is a felony. Punishment, death, or penitentiary 8 to 18 years. (Code §4407.)

(3) *Abduction of lunatics, etc.*—Abducting, kidnapping, or aiding escape of inmates of public hospitals is a misdemeanor. Punishment, fine \$50 to \$100, or jail 1 to 6 months, or both. (Code, §4412.)

(4) *Kidnapping as a slave.*—Kidnapping a person as a slave is a felony. Punishment, penitentiary 3 to 10 years. (Code, §4408.)

(5) *Abduction of females for marriage or defilement.*—The following instances of abduction are felonies: (a) To take away or detain, against her will, any female, with intent to marry her, or to defile her (i. e., to have sexual intercourse with her), or cause her to be married or defiled by another; (b) to take from her parents or any person having lawful charge of her, even, though not against her will, a female under 16 years of age, for the purpose of "concubinage or prostitution", i. e., of causing her lewdly to live with

one person alone, or to receive many persons in the same lewd way, as, in a house of ill-fame; and (c) to assist in such abduction or detention for such purpose. Punishment, penitentiary 2 to 5 years. (Code, §4411.) The taking with the intent makes the offense, and sexual intercourse is not necessary. If there be sexual intercourse, and the child is under 15, it is rape, even though it be with her consent; if 15 or more, it would be rape, if against her will, but if by her consent it would be adultery or fornication, if only one or a few acts, but lewd and lascivious cohabitation, if lewdly living together. See *Adultery, Fornication, and other Lewdness*; and *Rape*. In the case of abduction, as in the case of seduction, the subsequent marriage of the parties bars any conviction, and no conviction can be had on the evidence of the female alone. The indictment must be made within 2 years. (Code, §4413.)

The pandering or "White Slave Traffic" act (Code, §4579) is much broader in its terms. It has no age limit; but if the female is over 16, the taking to a house of ill-fame or assignation, or elsewhere, for the purpose of illegal sexual intercourse, must be against her will. The punishment is penitentiary 1 to 10 years, and fine not over \$1,000. Every one in any way connected with this traffic in the virtue of girls is likewise guilty of felony. See *Adultery, Fornication and other Lewdness*.

§3. Form of "description" in warrant or indictment—

No. 1. TAKING AWAY OR DETAINING A FEMALE AGAINST HER WILL, WITH INTENT TO MARRY OR DEFILE HER, OR CAUSE IT TO BE DONE.

(Code, § 4411.)

DESCRIPTION:

"feloniously did take away, against her will, one E. F., a female over the age of sixteen years, with intent to marry (and defile) her the said E. F. (or to cause her to be married (and defiled) by one G. H.)"

[In indictment, a count may be added for *detaining* her with such intent.]

No. 2. TAKING AWAY A FEMALE UNDER THE AGE OF SIXTEEN YEARS FOR THE PURPOSE OF CONCUBINAGE OR PROSTITUTION.

(*Idem.*)

DESCRIPTION:

"from A. B., the father (or *guardian*) and person then having lawful charge of the person of one E. F., a female under sixteen years of

age, then and there unlawfully and feloniously did take the said E. F., for the purpose of prostitution (or *concubinage*)."

[In indictment a count may be added for taking for *concubinage*.]

No. 3. ILLEGALLY TAKING A CHILD OF ANOTHER.

(Code, § 4409.)

DESCRIPTION:

"illegally, unlawfully, and feloniously did seize, take away, and secrete from the said A. B., one E. F., the child of the said A. B., who then had the lawful custody and charge of the person of the said E. F."

ABORTION AND MISCARRIAGE

§1. Definition and punishment

§2. Form of "description" in warrant or indictment

§1. Definition and punishment.—To use a drug or other means with intent to destroy an unborn child, or to produce abortion or miscarriage, whereby such result is accomplished, is punishable by penitentiary 3 to 10 years; unless, indeed, such act is done in good faith with the intention of saving the life of the woman or child. To encourage or prompt abortion or miscarriage by book, lecture, advertisement, or otherwise is punishable by jail 1 to 12 months, and fine \$100 to \$500. (Code, §4401.) Technically, miscarriage is within six weeks, and abortion is between then and the end of the sixth month; after then the child may live and it is premature birth. If the child is born alive and from the injuries inflicted dies afterwards, the offense is murder. An attempt to produce abortion must be prosecuted within two years. (Code, §4768).

§2. Form of "description" in warrant or indictment.—

No. 1. WARRANT OR INDICTMENT FOR PRODUCING ABORTION OR MISCARRIAGE, &c., OR DESTROYING UNBORN CHILD.

(Code, § 4401; H's G. & M. pp. 229 & Seq.)

DESCRIPTION:

"feloniously did administer to and cause to be taken by one E. F., then being pregnant with child, a certain medicine, drug or substance, called *savin* (or whatever thing it may be), with intent to procure

the abortion (or *miscarriage*) of the said E. F., and whereby he, the said C. D., did procure her abortion (or *miscarriage*), and destroy the said child [or "with intent to destroy the said unborn child, whereby he, the said C. D., did destroy the said unborn child"].

No. 2. WARRANT OR INDICTMENT FOR PROMPTING THE PROCURING OF ABORTION OR MISCARRIAGE, BY PUBLICATION OR OTHERWISE.

(*Idem.*)

DESCRIPTION:

"unlawfully did publish a certain book, tract, pamphlet, or circular (or unlawfully did any of the things enumerated in the statute) wherein the said C. D., did encourage and prompt the production of abortion (or *miscarriage*)."

ABSCONDING DEBTOR

- §1. Attachment
- §2. Capias against execution-debtor
- §3. Bail or jail in civil cases

§1. **Attachment.**— See *Attachments*.

§2. **Capias against execution-debtor.**— For the proceeding to arrest an absconding execution-debtor, who has failed to answer questions in due time and properly, as to what property he has liable to execution, see section 6506 of Code.

§3. **Bail or jail in civil cases.**— In any action or suit, on affidavit before the court, the judge, or clerk, stating that the plaintiff has cause of action or suit against the defendant, the amount and justice of his claim, "and that there is probable cause for believing that the defendant is about to quit this State, unless he be forthwith apprehended", such clerk, upon bond being filed issues a writ of capias ad respondendum, i. e., a writ to arrest and hold him to answer any such action or suit. Under such capias he is committed to jail, unless bond be given in a sum equal the plaintiff's claim, with the condition that if there shall be any judgment, decree, or order, the defendant will be on hand to answer any questions as to his property and make conveyance and delivery of the same,

or else will perform and satisfy the said judgment, decree, or order. The said *capias* or bond may be quashed by the court or judge, if it appears that there was not probable cause for believing that the defendant was about to quit the State. But before suing out the *capias*, the plaintiff himself must give bond to pay all costs and damages which may be awarded against him or sustained by the defendant by reason of the arrest. (Code, §§6419-27.)

ABUSIVE LANGUAGE

- §1. Civil injury
- §2. Criminal offense
- §3. Form of "description" in warrant

§1. Civil injury.—Slander, or words spoken to one person about another, which are injurious to his reputation, is a ground for a suit for damages; if the words be written or printed, it is called libel, which is a misdemeanor as well as a civil injury. See *Libel* and *Slander*. By statute it is provided that insulting words, or words which from "the usual construction and common acceptance are construed as insults and tend to violence and breach of the peace", are a ground for a damage suit. (Code, §5781.)

§2. Criminal offense.—But as most persons who indulge in abusive or insulting language are not responsible for damages, it was found necessary to make the use of abusive language, in the presence of another, a misdemeanor, as follows: "If any person shall within the presence or hearing of another, curse or abuse such person, or use any violent, abusive language to such person concerning himself or any of his female relations, under circumstances reasonably calculated to provoke a breach of the peace, he shall be deemed guilty of a misdemeanor", and fined by the justice \$2.50 to \$500. (Code, §4536.) It is also a misdemeanor punishable by fine not exceeding \$100, to "curse or abuse any one, or use vulgar,

profane or indecent language over any telephone in this State". (Code, §4569.) And by recent statute slander or libel is made a criminal offense—see *Slander*, section 6.

Threatening by letter, whether signed or not, to kill or do bodily harm to a person or any member of his family, is punishable by penitentiary not exceeding 5 years, or jail 30 days to 12 months, or fine not less than \$50. (Code, §4537.)

§3. Form of "description" in warrant.—

No. 1. ABUSIVE LANGUAGE. (Code, § 4536.)

DESCRIPTION:

"In the presence and hearing of the said A. B., did curse (or *abuse*) the said A. B., (or *did use violently abusive language to the said A. B., concerning himself or one E. M., a female relative of the said A. B.*), under circumstances reasonably calculated then and there to provoke a breach of the peace."

ACCIDENT OR ACT OF GOD

§1. Accidents

§2. Act of God

§1. Accidents.—Accidents are of two kinds, those that happen unexpectedly by human agency, with varying degrees of fault or negligence, as where in walking one accidentally falls and hurts himself; and those that happen without human agency, which are styled in law "the act of God", as, where caused by lightning, earth-quake, storm and the like. It is oftentimes important to know whether an injury happened by accident or by blamable negligence. An accident is frequently a ground for remedies and relief in the court. (See general common law authorities.)

§2. Act of God.—There is a maxim which says, "The law holds no man responsible for the act of God". Duties are imposed either by law or by contract. When a duty is imposed by law and the party cannot perform it owing to the act of God, the law excuses him. A public carrier of goods

is not responsible for their loss, damage or delay caused by the act of God. But when the duty is imposed by contract, he is generally not excused; yet death, which is regarded as an act of God, discharges contracts for strictly personal services, marriage, etc.

If a renter agrees "to pay rent" or "to leave the premises in good repair", he is bound to do so, even though the building is damaged by lightning or storm, or other act of God; but section 5180 of the Code provides otherwise, where the building is destroyed. A special provision to meet this should be inserted in leases, as follows: "The said lessor covenants that if the said building shall be destroyed, or so injured as to render it untenable, this lease shall thereupon be determined; and the said lessor shall not be liable for damage done to the building, without his fault or negligence, by accident, or by the act of God."

In the case of a "condition precedent" in a deed, i. e., where an event must happen before the estate is to vest or the deed is to take effect, if the happening of the event is afterwards rendered impossible by the act of God, the deed is void; but otherwise, as to a subsequent condition, i. e., where the event can happen only after the vesting of the estate, as, where a deed vests the property in the grantor's daughter, but has a proviso that the title shall be defeated if she does not marry a certain person within a certain time, and he dies within that time, the estate is not defeated because the condition subsequent was rendered impossible by the act of God.

If a person has an election to do either one of two things, and he is prevented from doing one by the act of God, he need not do the other; but if he is bound to do two things, and one becomes impossible by the act of God, he is bound to do the other.

If a condition subsequent in a bond, afterwards becomes impossible by the act of God, the bond is void; as, where one is bound in a bond that another should appear in court, and the latter dies before court, the bond is saved by the act of God.

Where a contract contemplates the continued existence of a thing as the foundation of it, if the thing is destroyed by accident or act of God, there is an implied condition that the

contract need not be performed. Impossibility of performance is an excuse for not performing an implied agreement. (See general common law authorities.)

ACCOMPLICE

An accomplice, or a *particeps criminis*, is one who is in some way concerned in the commission of a crime, either as principal in the first or second degree, or as accessory before or after the fact. See *Criminal Law and Procedure*.

An accomplice, whether tried jointly or separately, or not tried at all, is a competent witness even after verdict and judgment against him for felony, but the fact of conviction may be shown as but affecting his credit (Code, §§4778-9).

His evidence alone is rarely sufficient to convict.

Confessions by an accomplice made after the felony was committed are not evidence against the prisoner, even though a conspiracy between them has been proved.

ACCOUNTS

§1. Definitions

§2. Limitation of accounts

§3. Account book as evidence

§4. Forms of a "bill" and a "statement"

§1. Definitions.— An "account" is a list or statement of items, whether of debits or credits, or both, in most cases showing the amount or balance due, and arising out of contract, expressed or implied, or from some other duty imposed by law, as those of administrators, executors, guardians, etc. Accounts embrace money transactions such as payments, purchases, sales, debts, credits, etc.

"Mutual accounts" are those that have transactions between the parties on both sides of such a nature that each might sue the other, or that the items on one side might be set off against those on the other; a debit on one side and part payment by the other does not make an account mutual.

An "open account", or "account current", or "running account", is one in which there have been continuous dealings, and not closed but kept open for further transactions.

An "account rendered" is one which is drawn up in form and delivered to the debtor.

When merchants or other business concerns sell goods, whether for cash, to be paid for on delivery, or on credit, they usually give or send the purchaser at the time a "bill" of the items, or "invoice," with prices, sometimes called a "bill of parcels". This is what one means when he writes to send him so and so "with bill" or "invoice." Where several bills have already been sent of different purchases at different times, an account of the bills or of all the items thereof, with the prices, is sent. This, in commercial life, is called a "statement", and when sent is called an "account rendered".

An "account stated" is an agreement, expressed or implied, between the parties, fixing the amount due, as, where a balance is ascertained and struck between them. It is not needful that there should be mutual items of charge or credit. An acknowledgement of a single item of debt, however informally made makes it an account stated; as, where an account is presented for payment, and the defendant acknowledges and promises to pay it. The account stated, however, must not relate to a debt depending on a contingency, but to one of a definite amount then existing, which the defendant admits to be unconditionally due then. The account stated and the accompanying acknowledgment of a balance, is not conclusive, but only presumptive evidence, and does not preclude the debtor from controverting or explaining any items in the account, or the whole of it. (3 Min. Inst. 387-8.)

From an account stated the law implies a promise to pay the balance ascertained to be due, and a recovery may be had upon this new promise without proving the separate items of the account. But for an account stated to stop the running

of the statute of limitations against the items of the account, there must, under the statute (Code, §5812), be a writing signed by the debtor or his agent promising payment of the balance due, or some writing from which such a promise may be implied. (See 93 Va. 64, overruling 85 Va. 820.) An account rendered by a consignee, factor, agent, attorney, executor, trustee, or the like, is to be taken as *prima facie* correct.

§2. Limitation of accounts.— The limitation of store accounts is 3 years, except partnership accounts, and accounts between “merchant and merchant, their factors, or servants”, which is 5 years from the time they cease to deal with each other. (Code, §5810). In the case of accounts where the items are all on one side, the limitation runs against each item from its date. In the case of mutual open accounts, it is held in most of the states that the last item “draws to itself all the other items”, and that limitation runs from the time of the last item. But in Virginia the rule seems to be that limitation runs from the date of each item; that not even an account stated will stop the running if limitation on the several items, unless such account stated be in writing signed by the debtor or his agent. If a verbal agreement, expressed or implied, be relied on, it can avail only when it is made upon such consideration and under such circumstances as to amount to a new contract. (Code, §5810; 93 Va. 64.)

§3. Account book as evidence.— An account book kept by a merchant, trader, mechanic, or other person, in the regular course of his business, by himself, clerk, or agent, if the entries therein are original entries or charges and are made at or about the time of the transaction, may be used as evidence so far as it relates to goods sold or services rendered, but not as to other or outside matters. The book of accounts must of course be authenticated by the testimony of the party in whose handwriting it is, or if such party be dead, by proof of his handwriting. (See general authorities on evidence.)

§4. Forms of a "bill" and a "statement."

No. 1. A BILL

Pulaski, Va., Oct. 19, 1921.

Mr. Wm. Blackstone,

In Account With
HURST & COMPANY
Law Book Publishers

Terms: Cash (or 30 days, or as the terms may be).

	Dr.	
To 1 Hurst's Pocket Code of Virginia.....	\$10.00	
To 1 Set Hurst's Encyclopedia of Va. Law.....	15.00	
		<u>\$25.00</u>

No. 2. A STATEMENT.

Pulaski, Va., Jan. 1, 1922.

Mr. Wm. Blackstone,

In Account With
HURST & COMPANY
Law Book Publishers

Terms: Cash (or 30 days, or as the terms may be).

	Dr.	
Oct. 12. To Bill rendered	\$ 12.00	
Nov. 5. To Bill Rendered	5.00	
Dec. 10. To Bill Rendered	3.00	
		<u>\$ 20.00</u>
	Cr.	
Nov. 20. By Cash	\$ 4.00	
Dec. 15. By Check	6.00	
		<u>10.00</u>
Balance due.....		10.00
	Dr.	
Oct. 12. To 1 Hurst's Pocket Code	\$ 10.00	
Oct. 12. To 1 Hurst's Guide and Manual.....	5.00	
Nov. 5. To 1 Form Book	5.00	
Dec. 10. To 2 Va. Constitutions, @ \$1.50.....	3.00	
		<u>\$ 23.00</u>
	Cr.	
Nov. 20. By Cash	\$ 4.00	
Dec. 15. By Check	6.00	
		<u>\$ 10.00</u>
Balance due		\$ 13.00

If paid, say:

Paid 1/2/22

Hurst & Co.

ACKNOWLEDGMENTS

- §1. Before whom writings are acknowledged or proved.
 - (1) Proof by two competent witnesses.
 - (2) Acknowledgment by the parties.
- §2. Fee for acknowledgments.
- §3. How deeds by corporations acknowledged.
- §4. How deeds by trustee, commissioner, etc., acknowledged.
- §5. Forms of certificate of acknowledgment in Virginia.

§1. Before whom writings are acknowledged or proved.

Writings are acknowledged or proved that they may be admitted to record, and are recorded to give the public notice of them. The circuit or corporation court, or the chancery court of the city of Richmond, or the clerk or his deputy, in his office, shall admit to record any recordable writing which has been authenticated in either of the following modes:

(1) *Proof by two competent witnesses.*—The proof may be made, in Virginia, before the court, or the clerk, or his deputy, in his office, certified in either case under his hand. If the proof be taken in any other state of the Union, it may be made before any court or the clerk thereof, or his deputy, certified in either case under his hand. If the proof be taken out of the United State, it may be made before any ambassador, minister plenipotentiary, minister resident, charge d'affaires, consul-general, consul, vice-consul, or commercial agent appointed by the government of the United States to any foreign country, or before the proper officer of any court of record of such country, or the mayor or other chief magistrate of any city, town, or corporation therein, and certified under the official seal of the functionary. (Code, §§5204.)

If a writing be executed but not acknowledged, and the grantor dies, or fails or refuses to acknowledge it, it may be recorded upon proof by two witnesses of its execution.

(2) *Acknowledgment by the parties.*—(a) The acknowledgment may be made, in Virginia, before any circuit or corporation court, or the chancery court of the city of Richmond, or its clerk, or his deputy, or the clerk or deputy of any court of record in this State, in his office, before a justice of the peace, a commissioner in chancery of a court of record, of a

notary or other authorized officer, certified by the clerk or officer taking it, under his hand.

(b) If the acknowledgment be taken in any other state of the Union, it may be made before the clerk of any court, or his deputy, "a justice, a commissioner in chancery of a court of record, a notary public within the United States, or in the Phillipine Islands, Porto Rico, or in any territory or other possession or dependency of the United States", or any commissioner appointed by the governor of Virginia within the United States, certified by the clerk or officer taking it, under his hand.

(c) If the acknowledgment be taken out of the United States, it may be made before any ambassador, minister plenipotentiary, minister resident, charge d'affaires, consul-general, consul, vice-consul, or commercial agent appointed by the government of the United States to any foreign country, or before the proper officer of any court of record of such country, or the mayor or other chief magistrate of any city, town, or corporation therein, and certified under his official seal. (Code, §§5205-6 and Act 1922, amending §5205.)

A notary should state in his certificate when his commission expires, and a woman notary marrying, or otherwise changing her name, should also say in her certificate, "I was commissioned as notary as _____" (here give former name). (Code, §5210.)

A married woman, in Virginia, acknowledges a writing like any other person.

Acts 1920, pp. 69, 340, 405, validates acknowledgments of notaries who served in the war, etc; of notaries and commissioners holding other offices; and of justices and mayors, designated as police justices or mayors.

§2. Fee for acknowledgment.—The fee for taking and certifying the acknowledgment of any deed or writing is fifty cents. But if taken before the clerk admitting the same to record, he gets nothing for the mere certificate of acknowledgment. (Code, §3480-2, and Acts 1920, p. 804, amending §3481.)

§3.—How deeds by corporations acknowledged.—See *Corporations*, section 14. For form, of such acknowledgment, see Nos. 25 and 26, under *Corporations*.

§4. How deeds by trustee, commissioner, etc., acknowledged.—The certificate need not state that the acknowledgment of a trustee, commissioner, or other person signing in a representative capacity, was in a such capacity. (Code, §5207.) For form of such acknowledgment, see No. 4, under section 5, below.

§5. Forms of certificate of acknowledgment in Virginia.

No. 1. BY A JUSTICE OR NOTARY.

(Code, §§ 5205-6, and Acts 1922, amending §5205.)

County (or *Corporation*) of....., to-wit:

I, J. T., a justice of the peace (or *notary public*) for the county (or *corporation*) aforesaid, in the state (*territory* or *district*) of, do certify that A. B. and B. C., whose names are signed to the writing above (or *hereto annexed*), bearing date on the..... day of....., 192..., have acknowledged the same before me, in my county (or *corporation*) aforesaid. [In case of a notary, say: "My commission expires....., 192..."]

Given under my hand (or *hand and notarial seal*), this.....day of....., 192....

J. T., J. P. (or N. P.)

No. 2. BY A CLERK OR HIS DEPUTY, OR A COMMISSIONER IN CHANCERY.
(*Idem.*)

County (or *corporation*) of....., to-wit:

I, C. A., clerk (or *deputy clerk* or *a commissioner in chancery*), of the..... court, for the county (or *corporation*) aforesaid, in the state (*territory* or *district*) of....., do certify that A. B., whose name is signed to the writing above (or *hereto annexed*), bearing date on the..... day of....., 192..., has acknowledged the same before me, in my county (or *corporation*) aforesaid.

Given under my hand this..... day of....., 192...

C. C., clerk (or *deputy clerk*
or *com'r in ch'y*).

No. 3. BY A COMMISSIONER APPOINTED BY THE GOVERNOR.
(*Idem.*)

State (*territory* or *district*) of....., to-wit:

I, C. A., a commissioner appointed by the Governor of the state of Virginia, for the said state (*territory* or *district*) of....., certify that A. B., B. C., and C. D., whose names are signed to the writing above (or *hereto annexed*), bearing date on the..... day of....., 192..., have acknowledged the same before me, in my state (*territory* or *district*) aforesaid.

Given under my hand this..... day of....., 192....

C. A., com'r.

No. 4. IN CASE OF DEEDS, ETC., TRUSTEE, COMMISSIONER, ETC.
(*Idem.*)

State (or territory or district) of-----; county (or corporation)
of-----; to-wit:

I, -----, a -----, (here insert the official title of the person certifying the acknowledgment), in and for the state (or territory or district) and county (or corporation) aforesaid, do certify that----- (here insert the name or names of the persons signing the writing on behalf of the person, or the name of the person signing the writing in a representative capacity), whose name (or names) is (or are) signed to the writing above, bearing date on the----- day of-----, has (or have) acknowledged the same before me in my county (or corporation) aforesaid.

Given under my hand, this----- day of-----, 192--

-----N. P. (or other officer.)

ADJOINING LANDOWNERS

See *Drainage and Pollution of Streams.*

- §1. Neglect or wrongful use of one's land to the injury of another's land.
- §2. Encroachments on another's land.
- §3. Keeping dangerous things on premises.
- §4. Right to lateral support.
- §5. Party walls.
- §6. Trees near line.
- §7. Working mines near another's land.
- §8. Adjoining fishing shores.

§1. Negligent or wrongful use of one's land to the injury of another's land.—The law forbids one to use his land in such a way as materially to injure the land of an adjoining owner. If a landowner, in doing a lawful but dangerous act on his own land, does it so unskillfully or negligently as to cause injury thereto, or if he wrongfully does injury thereto, he is liable in damages; but an owner is not responsible for such negligent or wrongful act of a contractor who has exclusive control over the work. To prevent a great injury, whether by owner or contractor, an injunction may be had. A landowner is liable for injuries caused to another's

premises by his failure to keep his own premises in repair. (See general common law authorities.)

§2. Encroachments on another's land.—An encroachment is a private nuisance, which the adjoining owner may abate, and which he should do without unnecessary damage. An adjoining owner may also have relief by injunction against a threatened encroachment, if he cannot be adequately compensated in damages. (See general common law authorities.)

§3. Keeping dangerous things on premises.—An owner is required to take proper measures to prevent any injury resulting to adjoining land from any dangerous thing on his own land; and if he fails to do so, he is liable in damages. (See general common law authorities.)

§4. Right to lateral support.—Every person, by the law of nature has a natural right as incident to his land, to support for it from the adjacent (side) and subjacent (under) soil. Thus, where an adjoining owner excavates, taking away the lateral support of his neighbor's ground, causing it to slide of its own weight, he is liable for such damages, regardless of the care exercised in the excavating. This right does not apply to buildings; the right to such support is acquired by grant, either express or implied, but not by long use; it is implied in every case, unless stipulated to the contrary, where the owner of adjoining houses, or of houses and lands, severs the property by sale; but this right is confined to the buildings then upon the land, and is not applicable to subsequent buildings or burdens upon the land, where the increased weight of the burdens causes the injury. Though there be no right to lateral support, yet one must use due care (which in some cases may require temporary supports) in removing his building or making an excavation, not to injure the building or wall of another, otherwise he is liable for damages. Unless already apprised of the fact, notice should be given of the proposed changes. (See general common law authorities.)

§5. Party walls.—A party wall is one erected on the line between two adjoining properties, belonging to different persons, for the use of both estates. Every wall and separation between two buildings is presumed to be a common or party wall, if the contrary be not shown. Where a double

brick building is conveyed one-half to one party and the other half to another, it is a party wall. As to a wall on the line, each owns so much thereof as is on his side, subject to the mutual right to support. Each may use the exterior or his part for building purposes. A wall may be a party wall as to a portion of its height, and an individual wall above. Windows cannot be put in a party wall. Where one builds a wall on the line, without any understanding with the owner of the other lot, the latter may use the wall without charge; but the law readily implies an agreement to pay from facts and circumstances. One owner of a party wall may erect a new building on his lot and carry the party wall up to a height sufficient for his purposes. Where a party wall is in a state of ruin so that rebuilding is necessary, one party may compel the other to help; but if the new wall is made wider or higher, or if the old wall was sufficient for the purposes for which used, the expense of the increased height or width of the wall in the first case, or the rebuilding of the wall in the second, must be borne by the party at whose instance the work is done. Where the owner of two adjoining lots conveyed one, with a house on it, and reserved in the deed the right to join the two end walls of the house free of cost, the purchaser from the grantor has a right thus to join his building to that of the grantor, or to build an independent wall along the side of it. Each must so deal with a party wall as not to impair any rights the other may have. Each party may make changes therein, by underpinning or increasing its height, but not to the injury of the other, without payment of damages. (See general common law authorities.)

§6. Trees near line.—A tree on the land of one owner, but its roots extending into the land of another, belongs to the former; and overhanging fruit belongs to the owner where the trunk of the tree stands. But while the adjoining landowner cannot sue for damages, yet he may cut the roots and clip the branches on his side. A tree on the line belongs to both, and neither must injure or cut it without the consent of the other. (See general common law authorities.)

§7. Working mines near another's land.—See Code. §§5287-8.

§8. Adjoining fishing shores.—See Code, §§5290-2.

ADMINISTRATORS AND EXECUTORS

(See 3 *Min. Inst.*, Pt. I.)

- §1. Definition
- §2. Difference between executor and administrator
- §3. When administrator appointed
- §4. When curator appointed
- §5. Who to be preferred as administrator
- §6. By whom administrator appointed
- §7. How executor or administrator qualifies
- §8. Duties of an executor and administrator
 - (1) To bury the deceased
 - (2) To prove the will of the deceased.
 - (3) To file with clerk a list of heirs
 - (4) To make an inventory or appraisement of the estate
 - (5) To collect and get in the estate
 - (6) To pay the debts of the deceased
 - (7) To pay legacies
 - (8) To distribute the residue of the estate
 - (9) To execute a deed pursuant to the contract of the deceased
 - (10) To make annual settlements of the administration accounts
- §9. Useful forms under "Administrators and Executors"

§1. Definition.—An administrator or executor is one who administers or settles the estate of a deceased person. He is sometimes referred to as a "personal representative", because he is the person who represents the deceased; and is embraced by the word "fiduciary", i. e., one in a position of confidence or trust to another, as is also a guardian, trustee, committee of a lunatic, etc. If the personal representative is a woman, she is called administratrix or executrix.

§2. Difference between executor and administrator.—The only difference is in their appointment. He is called an executor if appointed in the will; but an administrator, if appointed by court or its clerk. Their powers and duties are the same.

§3. When administrator appointed.—If the dead person, called "decedent", died "intestate", i. e., without a will, or testament, the court or clerk appoints an administrator to settle the estate as the law directs; but if there be a will, but no executor is named in it, or if all the executors therein named

refuse to serve, or fail, when required to give bond, or die before qualifying, or resign or are removed from office, the court or clerk may appoint an administrator "with the will annexed", and in administering the estate he is of course governed by the will and the law. (Code, §5358.)

For appointment of administrator for a person presumed to be dead by reason of seven years absence from his former domicile, or home, see Code, §§5361-2.

Where the sole surviving executor, after commencing the administration, dies, resigns, or is removed, an administrator de bonis non (i. e., of the goods not administered), with the will annexed, is appointed (Code, §5372); and if an administrator die, an administrator de bonis non may be appointed.

If a female personal representative marry, her authority is not extinguished, but she may be superseded by an administrator de bonis non (with the will annexed, if there be a will). (Code, §5373.)

If two or more persons are appointed administrators, they must act jointly; while two or more executors may act separately. Where the estate is not over \$300, no administrator need be appointed (Acts 1920, p. 361)—see *Minors, Infants, etc.*, section 18.

§4. When curator appointed.—During a contest about a will, or infancy, or in the absence of an executor, or until an administrator is appointed, the court or clerk may appoint a curator, who gives bond in a reasonable penalty, and takes care that the estate is not wasted. He may also collect and recover by suit or otherwise all debts and personal estate; and pay debts, and be sued like an administrator or executor; and when an administrator or executor qualifies, such curator shall account with and pay and deliver to him such estate as he has in his hands or may be liable for. (Code, §5248.)

§5. Who to be preferred as administrator.—The husband or wife is preferred first, and then such of the other distributees (i. e., persons who will receive the estate of the deceased), as a court or clerk shall see fit to appoint; but any of them may waive their right to qualify in favor of any other person named by them; or if none of them apply within 30 days after the party's death, a creditor or any other person may be appointed. (Code, §5360.) If no one applies

to be appointed within 2 months after the party's death, the court or clerk, on motion of any other person, orders the sheriff or sergeant to administer the estate, and he is not required to take any oath or give any bond; but the court may afterwards revoke such order and allow some other person to qualify. (Code, §5374.)

§6. By whom administrator appointed.—An administrator may be appointed by the circuit court or corporation court, or by the clerk of the circuit court, in the county or corporation wherein the deceased has a mansion house or known place of residence; but if he has no such house or place of residence, then where he has any real estate; and if none, then where he died, or where he has personal estate. The Chancery Court of Richmond and its clerk have the same jurisdiction. (Code, §§5360, 5247, 5249.)

§7. How executor or administrator qualifies. They qualify by taking the oath and giving bond. The oath of an executor, or administrator with the will annexed, is "that the writing admitted to record contains the true last will of the deceased, so far as he knows or believes, and that he will faithfully perform the duties of his office to the best of his judgment".

The oath of an administrator where there is no will, is "that he will faithfully perform the duties of his office to the best of his judgment". (Code, §§5359, 5369.) The bond shall be for at least the full value of the personal estate, and money that may come into his hands from sale or rents and profits of real estate, usually double that value. If the will directs that no security shall be given, the court or clerk will not require it, unless on application of some one interested, or from the judge's or clerk's own knowledge, he thinks security ought to be required. (Code, §§5370-1.)

§8. Duties of an executor and administrator.—Their duties are practically the same, except that an executor should bury the deceased and prove his will, and an administrator is required to file with the clerk a list of heirs.

The duties of an executor and administrator are as follows: (1) To bury the deceased; (2) to prove his will; (3) to file with the clerk a list of heirs, where there is no will; (4) to make an inventory or appraisement of the estate; (5)

to collect and get in the estate; (6) to pay the debts of the deceased; (7) to pay the legacies; (8) to distribute the residue of the estate; (9) to execute a deed pursuant to the contract of the deceased; (10) to make annual settlements of the administration accounts.

(1) *To bury the deceased.*—An executor, before he qualifies, may bury the deceased, pay reasonable funeral expenses, and preserve the estate from waste. (Code, §5357.) The funeral should be conducted in a manner suitable to his estate and social position. It often happens that the deceased is buried before the contents of the will is known. Reasonable funeral expenses are allowed before all other debts or charges. If the executor ordered the funeral, he is personally liable, even though there be not enough estate to pay the cost of same; but, if he did not order it, he is liable only to the extent of the estate. (3 Min. Inst. 573; Code, §§5357, 2660.)

(2) *To prove the will of the deceased.*—A will is proved, or “admitted to probate”, as it is called, by proof before the court or clerk, showing that the testator, or person making the will, was of sound mind and capable of making a will, and that the will was properly executed and witnessed according to law, and is the last will of the deceased. Upon being proved, the will is ordered to be recorded as the last will of the deceased, and the original is filed in the clerk’s office. For proof to be offered upon submitting a will for probate, see subject *Wills*.

(3) *To file with clerk a list of heirs.*—Where there is no will, it is the duty of the administrator at the time of his qualification, to file in the clerk’s office a list of heirs, and so far as possible thier ages kinship, and addresses; to which he shall attach an affidavit of due diligence to ascertain the facts, and that the said list is believed by him to be true and correct. He shall be allowed no commissions until said list is filed and the receipted bill for recording same is filed with the vouchers in his settlement, unless, indeed, he file an affidavit stating that the heirs are unknown, and his inability to ascertain the facts. (Code, §5379, as amended by Act 1922.)

(4) *To make an inventory or appraisement of the estate.*—It is the duty of an executor or administrator to make and return to the commissioner of accounts an inventory of

the estate; or, in lieu thereof, have made an appraisement by three or more sworn appraisers appointed by the court, who shall appraise such good and chattels (including debts due the estate) as may be produced to them, and all real estate which he is authorized by the will to sell or rent; and the said appraisement shall be signed by them and returned to the commissioner of accounts, who inspects and approves the same and delivers it to the clerk for recordation. Such appraisement shall be prima facie evidence of the value of the estate embraced therein, and that it came to the hands of the executor or administrator. (Code, §§5376, 5403.) In the appraisement, all the items should be listed separately.

(5) *To collect and get in the estate.*—The executor and administrator should collect and get in promptly all the personal estate of the deceased (including debts due him and life insurance policies made out in his favor or in favor of his estate), for the three-fold purpose of paying his debts, paying off legacies, and making distribution of the surplus to those entitled thereto. If the deceased was a partner, his executor or administrator should not meddle with the partnership affairs, but leave it to the surviving partner to wind up the partnership, and to turn over to him the share belonging to the deceased, but he may settle or compromise with such surviving partner.

In getting in the estate, the executor or administrator should sell at public auction, all perishable property, and also all other personal chattels, if it be necessary, to pay funeral expenses, charges of administration, debts, and legacies; on which sales he should give a reasonable credit (except for small sums), and take bond with good security. (Code, §§5380-2.)

Within four months after such sale, an itemized account of the sales should be returned to the commissioner of accounts, and if approved by him, delivered to the clerk for recordation. (Code, §§5404-5.)

Dead victuals (or as much as necessary) which, at the death of the deceased, have been laid in for consumption in his family, shall remain for its use, if any member desire it, without account. Any live stock, necessary for the food of the family, may be killed for that use before the sale or dis-

tribution, and no account of it made (Code, §6554). And when the deceased has left a widow or minor children, or daughters who have never married, there shall be vested in such of them as then constitute members of the household, exempt from funeral expenses, charges of administration, and debts of the deceased, such property as is exempt under the "Poor Debtor's Law". See *Homestead and Other Exemptions*. (Code, §6562). Also, such widow, or if she die or marry, her minor children, by guardian or next friend, may select and set apart as exempt from sale \$2,000 worth of personal property, as exempt from the debts of the deceased, and also from the debts and obligations of such widow and children, until her death or marriage, and then until the children respectively retain the age of twenty-one or marry. (Code, §§6541, 6536.)

"Any estate for the life of another" is assets in the hands of an executor or administrator, to be applied and distributed as personal estate. (Code, §5383.)

An executor or administrator shall sell real estate directed by the will to be sold, and collect rents and profits of real estate directed by the will to be received; and shall pay over the proceeds and the rents to the persons entitled thereto. (Code, §§5393-4.)

An executor or administrator should proceed with reasonable diligence to collect all debts due the deceased, otherwise he will be held responsible for both principal and interest if the claim becomes barred by limitation, or if the debtor afterwards becomes insolvent, or the debt or other money is otherwise lost by his negligence or improper conduct (Code, §5406).

An executor or administrator has full dominion over the assets, and full discretion for the settlement of all claims due to or from the estate. He may make settlements and compromise with creditors or debtors, and give or take confessions of judgment. All the law requires is that he should act fairly, in good faith, and with due regard to the interests of the estate. (Code, §5440.)

(6) *To pay the debts of the deceased.*—Some debts are entitled to be paid before others. The regular priority in the payment of debts, after the payment of funeral expenses and charges of administration, are as follows:

(a) Claims of physicians, of druggists, of professional nurses, and of hospitals and sanitariums, not exceeding \$50.00 each, for services rendered and articles furnished during the last illness of the deceased.

(b) Debts due the United States.

(c) Debts due Virginia.

(d) Taxes and levies assessed upon the deceased previous to his death.

(e) Debts due as trustee (in deeds) for minors, insane persons, or other persons under disability; as receiver or commissioner under decree of court of this state; as executor, administrator, guardian, or committee, where the qualification was in Virginia.

(f) All other demands, except those in the next class, which are paid last.

(g) "Voluntary obligations", i. e., gifts under seal ("obligations" referring only to instruments under seal), as a bond executed without consideration and given to the party. This class should, but does not, include the gift of notes as well as bonds. (Code, §5390).

As to the above classes of creditors, no payment shall be made to those of one class until all those of the preceding class or classes have been fully paid; and a creditor of the same class is to be paid ratably when there are not enough funds to pay them in full. (Code, §5391.)

An executor or administrator who, after 12 months from his qualification, pays a debt of the deceased shall not thereby be personally liable for any debt or demand against the deceased of equal or superior dignity, whether it be of record or not, unless before such payment he had notice of such debt or demand. (Code, §5391.)

The foregoing provisions as to priority of payment does not affect a judgment, deed of trust, vendor's lien, reservation lien, execution, or other lien, acquired in the lifetime of the deceased, but these liens are to be paid before any other claim, preserving, of course, their priorities among themselves. (Code, §5400.) But a judgment obtained against an administrator or executor cannot be given any priority for that reason.

If an administrator or executor fails to pay the debts in

the order prescribed by law, he becomes personally liable, in case of shortage in assets, or funds. Or if he pay any debt the recovery of which could be prevented by reason of illegality of consideration (as, in case of gambling contracts, usury, or agreements in restraint of trade, or in violation of law or of public policy), or by pleading the statute of limitations, or by other defence, when he knows the facts by which the same could be prevented,—he is personally liable. (Code, §5406.) Open accounts against the deceased should be sworn to, and payment receipted.

If the personal estate is not sufficient to pay the debts of the deceased, the administrator or executor shall, for that purpose, sell any real estate that the will authorizes him to sell; but if no authority to sell is given by the will, then a creditor may bring a suit in chancery to sell the real estate; yet, in either event, the liens thereon are, of course, to be first paid in the order of their own priority (Code, §§5393, 5395, 5400.) In case of sale by him, he should, within four months thereafter, return an account thereof to the commissioner of accounts for his approval and for recordation by the clerk (Code, §§5404-5); and out of the proceeds pay such persons as are entitled thereto (Code, §5394). In case of a sale by the court, the proceeds are administered under its directions (Code, §5396).

In case of a sale by decree of a court of chancery, the order of marshalling assets, or arranging them so as to go the farthest toward paying the debts, is as follows: (1) Personal property; (2) real estate directed by the will to be sold for the payment of debts; (3) real estate not disposed of by will; (4) property, real or personal, given to persons, but subject to payment of debts; (5) legacies, i. e., personal personal property given by the will; and (6) real estate given by the will.

(7) *To pay legacies.*—A legacy is a gift of personal property by the will of the deceased; but a man must be just before he is generous; so an administrator or executor must not pay off a legacy until the debts are paid, otherwise he will be personally liable. Under our law, however, he is liable only when he pays the legacy within twelve months after his qualification, or pays it afterwards with notice of the debt,

or without taking from the legatee (i. e., the person who is to receive the legacy) a refunding bond, with sufficient security, conditioned to refund a due proportion of any debt or demand which may afterwards appear against the deceased, and of the costs attending their recovery. (Code, §§5437-8.) So he should be very careful about paying legacies within twelve month; he cannot be compelled to do so even though the will provides that he should; and after that time he should not accept a refunding bond when he knows of outstanding debts; if he knows of none, he cannot be compelled to pay a legacy until such bond is given, unless the court or judge in vacation, on application of the legatee, order the payment to the legatee without such bond, but he or his heirs are liable at any time within five years to refund a due proportion of any debts or demands appearing against the deceased, and of the costs attending their recovery. (Code, §5439.) For a discussion of legacies, see *Wills*, section 19.

(8) *To distribute the residue of the estate.*—It is the duty of an administrator or executor to distribute all the residue of the estate, after the payment of debts and legacies, to the persons entitled to it under the will, called “residuary legatees”; but if the will does not dispose of the surplus, then it goes to the next of kin of the deceased, according to the statute of distributions, i. e., in the same order as real estate descends, with certain exceptions—see *Descents and Distributions*.

(9) *To execute a deed pursuant to the contract of the deceased.*—Where the deceased has given a written contract for the sale of land, and said contract has been recorded, his executor or administrator, should execute a deed to the purchaser, provided he pays the purchase money and complies with the conditions, if any, of the contract. (Code, §5378.)

(10) *To make annual settlements of the administration accounts.*—It is the duty of an administrator or executor to make a statement of all money received or paid by him for each year of his service, together with all receipts or vouchers, within six months after the end of every such year, and exhibit the same before the commissioner of accounts, who shall state, settle, and report the account to court as provided by law, and if he fails to make said statement, or is found

chargeable for any money not embraced therein he forfeits all compensation for that year, unless allowed by court; and the said commissioner may, upon complaint made to him any time within ten years from the commencement of any such year, summon him (at his cost) to make such statement up to date, and if he fails to do so within one month after the service of the summons, the commissioner, upon request, reports the fact to court, which will compel him (at his cost) to do so, first by fine, and finally, if need be, by imprisonment for contempt. The forfeiture of compensation, however, is not incurred if the administrator or executor, within six months after the end of any year, has given such a statement to the persons concerned and has actually settled with them; or has settled his accounts for the year before a commissioner in chancery in a pending suit. (Code, §§ 5408-10.)

The commissioner, upon inquest of the administrator or executor, or person interested, fixes a time and place to receive proof of debts or demands against the estate, and 20 days before said time, is to post a notice thereof at the front door of the courthouse on the first day of a term of the court, and at two or more other public places in the neighborhood where the account is to be taken; furthermore, the commissioner is required, on the first of any court, or on the first Monday in any month, in any county, to post at the front door of the courthouse a list of those fiduciaries whose accounts are before him, and no account is to be completed until ten days after it has been mentioned in such list. The commissioner may adjourn from time to time, and must make up his account within a year. If there be any time prior to the year under consideration, the settlement may embrace it also. Any one interested may appear before the commissioner and insist or object as if the commissioner were acting under an order of court of chancery. He is, as soon as practicable, to return his report to court, who examines it, and if not re-committed, it is confirmed and recorded. (Code, §§ 5420-3, 5426-8, 5429.)

In his account, an administrator is chargeable with all property, real or personal (including crops), which came or should have come to his hands, as gathered from his inventory or the appraisement, from the account of sales, and from other sources, and for all debts collected, or which should

have been collected; in other words, he is chargeable for all assets or means of the deceased which did, or by due diligence might have, come to his hands, to be ascertained by an approximate estimate, if necessary. On the other hand, he is to be credited, besides all debts properly paid, with funeral expenses, and charges of administration, including any reasonable expenses incurred by him, as, a fee paid to counsel, etc.; and also, except where it is otherwise provided, a reasonable compensation in the form of a commission on receipts, or otherwise, usually 5 per cent, which is to be deducted every year before a balance is struck; and these claims have preference over all other creditors. (Code, §§5390, 5425.) There should be a voucher, or receipt, for each disbursement, whether for the payment of bonds, notes, or open accounts, which latter should be sworn to.

As to charging interest, a balance is struck each year, and interest thereon is charged thereafter. It is not usual to charge interest on the several items during the year, unless they be large and occur early in the year. Where the balance is against the administrator or executor, the money paid out during the following year is at its close to be applied first to the principal and then to the interest; but where the balance is in favor of him, the money received during the following year goes first to the interest and then to the principal. This difference in his favor is because he has more or less money idle in his hands to meet debts. But when all debts are paid, and he has only legacies, or money to pay out to heirs, the rule in his favor is reversed. These payments to heirs should not be mixed up with the general account, but a separate account should be kept with each, following the balance of the general account. See *Wills*, section 19, (4).

As to the form of the annual "statement", or account, which an administrator or executor is required to make to the commissioner, it is suggested that he list all items received or paid out separately with dates of each, under two heads, viz: first, Receipts, and then, Disbursements, following each item of disbursement with the receipt or voucher number, as, "To paid A. B. funeral expenses, V. No. 1.....\$25".

Formerly accounts were stated by commissioners on two pages, with Dr. on the left and Cr. on the right, but one page

is more convenient with Dr. and Cr. columns separately and to the right,—the one to the extreme right for receipts and the other for disbursements; then you can add the receipts and disbursements up separately. On the left should be a column for date, and a large space between for the items. The heading should be "Estate of A. B., deceased, In 1st (or 2nd, etc., or Final) Account with C. D., Administrator (or Executor), who Qualified _____ 192_____".

§9. Useful forms under "Administrators and executors."

No. 1. MEMORANDUM OF FACTS BY COUNSEL, ON MOTION TO APPOINT ADMINISTRATOR.

(Code, 1919, § 5360; Pollard's Code Biennial, 1920, p. 255.)

Date_____ 192__

1. Full name of decedent _____
2. Color of decedent and whether married or single_____
3. His last place of residence _____
4. Date and place of his death_____
5. Did he leave a will or any testamentary papers?_____
6. Full name of person making motion and grounds of being entitled to make it _____
7. Value of decedent's personal estate,_____ \$_____
8. Value of decedent's real estate in Virginia_____ \$_____
9. Total value of decedent's real and personal property__ \$_____
10. Full name and residence of person nominated as Administrator_____

11. Full name of surety offered _____
12. Bond of Administrator (to be fixed by Court)_____ \$_____
13. Name of five appraisers:
 1. _____
 2. _____
 3. _____
 4. _____
 5. _____
14. Names of distributees of estate _____

Signature of Counsel.

No. 2. MEMORANDUM OF FACTS BY COUNSEL, ON MOTION FOR PROBATE OF WILL AND QUALIFICATION OF EXECUTOR OR APPOINTMENT OF AN ADMINISTRATOR, C. T. A.
(Code, 1919, § 5247; Pollard's Code Biennial, 1920, p. 239.)

Date, _____, 192__

1. Full name of decedent _____
2. Color of decedent and whether married or single. _____
3. His last place of residence _____
4. Date and place of his death _____
5. Date of Will and how to be proven. _____
6. Number and dates of any codicils and how to be proven. _____
7. Are these all the testamentary papers? _____
8. In whose possession were the testamentary papers at testator's death? _____
9. Name of Executor appointed by will. _____
10. Full name of Administrator c. t. a., nominated and by whom nominated? _____
11. Has Executor power to sell real estate? _____
12. Value of decedent's personal estate _____ \$ _____
13. Value of decedent's real estate _____ \$ _____
14. Total value of decedent's real and personal estate. _____ \$ _____
15. Is the Executor relieved from giving security? _____
16. Full name of surety offered. _____
17. Bond of Executor or Administrator c. t. a., (to be fixed by Court) _____ \$ _____
18. Names of five appraisers:
 1. _____
 2. _____
 3. _____
 4. _____
 5. _____
19. Name of person making motion and grounds of being entitled to make it _____

Signature of Counsel.

No. 3. INVENTORY OR APPRAISEMENT OF ESTATE OF DECEASED.
(Code, §§ 5376, 5403.)

An appraisement of the goods and chattels, including moneys, bonds, accounts, and other claims or demands (and also the real estate authorized by the will to be sold or leased by the executor, if that be the case), belonging to D. D., deceased, in the county (or corporation) of _____, made by the undersigned appraisers appointed by the circuit (or corporation) court of said county (or corporation), at the _____ term of said court (or "by C. C., the clerk of the circuit (or corporation) court of said county (or corpora-

tion), on the _____ day of _____, 192__"), having first been duly sworn for the purpose.

1 sorrel horse _____ \$75.00

2 cows, @ \$25.00 _____ 50.00

Etc., Etc.

Given under our hands this the _____ day of _____, 192__

A. P.,

A. D.,

A. E.,

Appraisers.

NOTE:—In order to make this appraisement the inventory of the administrator or executor, let him add the following certificate:

I, C. D., administrator (or *executor*) of A. B., deceased, do certify that the foregoing inventory embraces all the personal (*and real*, if there be any) estate which has come to my possession or knowledge, or which is under my management or subject to my authority in my fiduciary character. This _____ day of _____, 192__

C. D., Adm'r (or *Ex'or*)

For certificate of oath of appraisers, use the following form:
Virginia, County (or *corporation*) of _____, to-wit:

I, J. T., a justice of the peace (or *notary public*, &c.), for said county (or *corporation*) and State, certify that A. P., A. D. and A. E., whose names are signed to the foregoing appraisement, before said appraisement was made, were first sworn before me, truly and justly, to the best of their judgment, to view and appraise such goods and chattels of D. D., deceased, as might be produced to them for appraisement ("and also the real estate authorized by his will to be sold or rented by the executor," if that be the case).

Given under my hand, this the _____ day of _____, 192__

J. T., J. P. (or N. P., &c.)

The commissioner of accounts adds the following approval:

The foregoing (or *within*) inventory and appraisement was this day inspected by me, and finding it to be in proper form, the same is approved this, the _____ day of _____, 192__

C. A., Commissioner of Accounts.

The clerk's order is as follows:

In the clerk's office of the Circuit (or *Corporation*) Court of the County or (*Corporation*) of _____:

On the _____ day of _____, 192__, the foregoing inventory and appraisement was this day received and admitted to record.

Teste:

C. C., Clerk.

By D. C., Dep. Clerk.

No. 4. ACCOUNT OF SALES BY ADMINISTRATOR OR EXECUTOR.
(Code, § 5404.)

An account of Sales made by C. D., Administrator (or *Executor*) of A. B., Deceased.

[Here give dates, and an itemized list of property, prices, and names of purchasers, and payments and securities.]

NOTE:—Commissioner's certificate and Clerk's certificate, are the same as in form No. 1, above, except use "account of sales" for "inventory and appraisalment."

No. 5. ADMINISTRATOR'S OR EXECUTOR'S STATEMENT OR ACCOUNT TO COMMISSIONER OF ACCOUNTS.
(Code, § 5408.)

First (or *Second, &c., or Final*) Statement or Account of C. D., administrator (or *Executor*) of A. B., deceased, made to Commissioner of Accounts the 20th day of May, 1922:

Receipts.

1921		
Jan.	5. Cash in D. B.'s possession at his death.....	\$ 100.00
Jan.	5. Cash on deposit in First Nat. Bk.	50.00
Jan.	5. Cash on deposit in People's Bk.....	70.00
Jan.	15. D. D.'s note to A. B., for \$200, with interest, paid....	200.00
Mch.	10. Amount from sales of property as per account of sales	150.00
		<hr/>
		\$ 570.00

1921		
Jan.	5. Paid C. C. Clerk's fees (\$2.50) and tax on probate of will, &c. and qualification, V. (voucher) 1.....	\$ 10.00
Feb.	20. Paid F. F., funeral expenses, V. 2.....	25.00
Feb.	20. Paid Dr. P., physician's account, V. 3.....	50.00
Feb.	20. Paid D. S., druggist's account, V. 4.....	5.00
Feb.	20. Paid Miss P. N., professional nurse, V. 5.....	15.00
Apr.	1. Paid Dr. H., for hospital service, V. 6.....	20.00
May	15. Paid A. B.'s bond to C. C., for \$100, with interest, V. 7	30.00
1922		
Jan.	4. Paid O. P., for effects delivered to Mrs. A. B., as a specific legacy, V. 8.....	50.00
Feb.	10. Paid A. T., attorney, for legal service, V. 9.....	5.00
Mch.	25. Paid C. A., Com'r of Accts., for settling and stating account, V. 10	6.00
Mar.	25. Paid Self, Adm'r (or <i>Ex'r</i>), 5 per cent on \$570.00, V. 11	28.50
Mar.	25. Paid widow's third to Mrs. A. B., V. 12.....	108.50
Mar.	25. Paid E. T., distributee, his share of residue of estate, V. 13	218.50

Mar. 25. Paid O. E., distributee, his share of residue of estate,	
V. 14 -----	218.50
	<hr/>
	\$ 570.00

Respectfully submitted,

C. D., Adm'r (or *Ex'r*).

No. 6. NOTICE TO BE POSTED OF TIME AND PLACE FOR RECEIVING
PROOF OF DEBTS.
(Code, § 5420.)

Notice to Creditors and Others Concerned:

Having for settlement the accounts of C. D., administrator of A. B., deceased, at the request of said C. D. (or any creditor, legatee, or distributee of the deceased), I have appointed the----- day of -----, 1921, as the time, and my office, at -----, Va., as the place, for receiving proof of debts or demands against the said A. B. or his estate.

C. A., Commissioner of Accounts.

No. 7. ADMINISTRATOR'S OR EXECUTOR'S ACCOUNT STATED BY
COMMISSIONER.
(Code, § 5408.)

The Estate of A. B., Deceased,
In Account with

C. D., Administrator (or *Executor*),
who qualified Jan. 5, 1921.

1921		Dr.	Cr.
Jan. 5.	To paid C. C., clerk's fee, \$2.50, and tax on probate of will, &c., and qualification, V. (voucher) 1-----	\$ 10.00	
Jan. 5.	By cash in A. B.'s possession at his death---		\$ 100.00
Jan. 5.	By cash on deposit in First Nat. Bk.---	\$50.00	
Jan. 5.	By cash on deposit in People's Bk.---	70.00	
			<hr/>
			120.00
Jan. 15.	By D. D.'s note to A. B., for \$200, with interest paid -----		200.00
Feb. 20.	To paid F. F. funeral expenses, V. 2-----	25.00	
Feb. 20.	To paid Dr. P., physician's account, V. 3-----	50.00	
Feb. 20.	To paid D. S., druggist's account, V. 4-----	5.00	
Feb. 20.	To paid Miss P. N., professional nurse, V. 5-----	15.00	
Mar. 10.	By amt. from sales of property as per acct. of sales -----		150.00
Apl. 1.	To paid Dr. H., for hospital service, V. 6---	20.00	
May 15.	To paid A. B.'s bond to C. C., for \$100, with interest, V. 7 -----	30.00	
1922			
Jan. 4.	To personal effects delivered to Mrs. A. B.,		

	as a specific legacy, V. 8.....	50.00	
Feb. 8.	To paid A. A., attorney, for legal services, V. 9.	5.00	
Mar. 25.	To paid C. A., Com'r of Accts, for setting and stating account, V. 10	6.00	
Mar. 25.	To paid Self, Adm'r (or Ex'r), 5 per cent on \$575.00, V. 11	28.50	
Mar. 25.	Residue distributed, as below stated.....	326.50	
		<hr/>	
		\$570.00	570.00
			<hr/>
	Amt. above distribution		\$ 326.50
	Widow's third paid her, V. 12.....		108.50
			<hr/>
	Balance for descendants.....		\$218.50
	Share of E. T., distributee, paid him, V. 13	\$109.25	
	Share of O. E., distributee, paid her, V. 14	109.25	
		<hr/>	218.50
			<hr/>

C. D., administrator (or *executor*) of A. B., deceased, according to law, has exhibited before me, C. A., commissioner of accounts of the circuit (or *corporation*) court, of the county (or *corporation*) of _____, on the 20th day of May, 1922, a statement of all money which he received or became chargeable with or disbursed within a year beginning on the _____ day of _____, 1921, together with the vouchers for his disbursements; and I have stated and settled, and now report the foregoing account of the transactions of the said fiduciary, showing no balance due (or "a balance of \$----- due") C. D., the said fiduciary, on the _____ day of _____, 1921, of which sum, \$-----, the principal thereof, is to bear interest from _____ day of _____, 1921.

The said settlement was not completed until ten days and more after it had been mentioned in a list of fiduciaries whose accounts were before me for settlement, posted at the front door of the courthouse of the said court, on the 1st day of the April term, 1922, of the said court (or *on the first Monday in* _____ (any month), 1922).

I further report that I have examined and find that the said fiduciary has given such bond as the law requires (or if there be any defect in the bond or security, state it), and that it is in the penalty of \$-----, and with sureties sufficient.

Respectfully submitted, this the _____ day of _____, 1922.

C. A., Commissioner of Accounts.

Fee for this account, \$-----, being for _____ hours of service, at 75 cents per hour.

I, C. A., commissioner of accounts as aforesaid, do hereby make oath that I was occupied ----- hours in settling and stating the foregoing account. This, the ----- day of -----, 1922.

C. A., Commissioner of Accounts.

Sworn to by the above named C. A., before me, C. C., clerk of the said court (or other proper officer), this the---- day of-----, 1922.

C. C., Clerk (or other proper officer).

In the Circuit (or *Corporation*) Court for the County (or *Corporation*) of -----, on the ----- day of -----, 1922:

The report of C. A., commissioner of accounts of this court, upon the accounts of C. D., administrator (or *executor*) of A. B., deceased, which was filed in the clerk's office of this court, on the----- day of -----, 1922, and which has remained therein one month, was this day examined by the court and no objections being filed thereto, the same is confirmed and ordered to be recorded.

C. C., Clerk.

ADOPTION

By section 5333 of the Code, as amended by Acts 1922; "A resident of this State who is not married, or a husband and wife (residents of this State) jointly, may petition the circuit or corporative or hustings court of a city or the circuit court of a county, in which city or county they reside, for leave to adopt a minor child not theirs by birth, and for a change of the name of such child; but a written consent duly acknowledged must be given to such adoption by the child if of the age of fourteen years or over and by each of his or her known living parents who is not hopelessly insane or otherwise incapacitated from giving such consent, or who is not habitually addicted to the use of drugs or of intoxicating liquors, or has not abandoned such child, or has not lost custody of the child through the order of a court; or if the parents are disqualified, as aforesaid, then by the legal guardian, or if there ben no such guardian, then by a discreet and suitable person appointed by the court to act in the proceedings as the next friend of such child; but if such parents or guardian join in said petition it shall be deemed such consent in writing.

Upon the filing of said petition the court shall direct a

probation officer or other officer of the court, or an agent of the State or county or city board of public welfare, or some other discreet and competent person, to make a careful and thorough investigation of the matter and report his findings in writing to said court. The person so directed to make such investigation shall make inquiry, among other things, as to:

- (1) Why the natural parents, if living, desire to be relieved of the care, support and guardianship of such child;
 - (2) Whether the natural parents have abandoned such child or are morally unfit to have its custody;
 - (3) Whether the proposed foster parent or parents is or are financially able and morally fit to have the care, supervision and training of such child;
 - (4) The physical and mental condition of such child.
- For this purpose said investigator may secure the opinion of a reputable physician or competent mental examiner.

If the court is satisfied that the natural parents have just cause for desiring to be relieved of the care, support and guardianship of said child, or have abandoned the child, or morally unfit to retain its custody; that the petitioning foster parent or parents is or are financially able and mentally and morally fit to have the care, supervision and training of such child; that said child is suitable for adoption in a private family home, and that such change of name and guardianship is for the best of said child, it shall make an interlocutory order setting forth the facts and declaring that from the date of the final order of adoption in such case, if such final order be afterwards entered, as hereinafter provided, such child, to all legal intents and purposes, will be the child of the petitioner or petitioners and that its name will be thereby changed. Such final order of adoption shall not be granted until the child shall have lived for one year in the proposed home and shall have been visited during the said period at least once in every three months by a probation officer, an agent of the State or county or city board of public welfare or other person designated by the court for the purpose. At any time before the entry of such final order of adoption, the court may revoke its interlocutory order for good cause, either of its own motion, or on the motion of the natural parent or parents of such child, the original petitioner or petitioners, or

the child itself by its next friend; but no such revocation shall be entered unless ten days notice in writing shall have been given to the original petitioner or petitioners (unless he or they make the motion), nor unless the original petitioner or petitioners if residents of the State or have removed from the State shall have been given an opportunity to be heard.

Upon the entry of such final order of adoption the judge or the clerk of the court shall notify the State Board of Public Welfare and the county or city board of public welfare, if there be one, of the action taken, giving the names and addresses of the natural parents, if known, or of the child's next of kin, the age and the name of such child both before and after adoption, and the names and addresses of the foster parents. Said boards of public welfare shall likewise be notified of any subsequent modification or revocation of such order of adoption.

The natural parents shall by such final order of adoption, be divested of all legal rights and obligations in respect to the child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them; such child shall from and after the entry of the interlocutory order herein provided for be, to all intents and purposes, the child and heir at law of the person so adopting him or her, unless and until such order is subsequently revoked, entitled to all the rights, and privileges and subject to all the obligations of a child of such person begotten in lawful wedlock; but on the decease of such person and the subsequent decease of such child without issue, the property of such adopting parent still undisposed of shall descend to his or her next of kin and not to the next of kin of such adopted child.

At any time after the final order of the court permitting such adoption and change of name, the parent or parents of such minor child, the State Board of Public Welfare, or the child itself, if twenty-one years of age, and if not twenty-one years of age, then the child by its next friend, or the adopting parents or parents, may petition the court which entered such order of adoption to vacate the same and terminate the adoption and restore the former name. And the court shall hear evidence for and against such petition, and if from such evidence it appears that a termination of such adoption and restoration of name is manifestly right and proper, and es-

pecially if it be for the best interests of the child, the court shall vacate said final order of adoption and change of name, and thereupon such child shall be restored to the position and name which it held before such final order of adoption. But beroe the court acts upon such petition, ten days notice in writing shall be given to the person or persons who had been permitted to adopt said child, if then residents of the State; and if said petition be filed by the next friend of said child, or by its parent or parents, and said child be over fourteen years of age, the court shall require said child to appear before it and ascertain its wishes in the matter, though the court need not be controlled thereby.

And the court shall see that all the property rights of such child, as well as of the person or persons adopting it, are protected, and may make such order as may be proper in the premises so that no injustice may be done."

§2. Useful forms under "Adoption."—

No. 1. PETITION FOR ADOPTION OF A CHILD.
(Code, § 5333, as amended by Acts 1922.)

To the Honorable Judge of the Circuit Court of the County (or Corporation) of -----:

Your petitioner (or *petitioners*), C. D., a person not married (or *C. D. and E. F., his wife*), an inhabitant (or *inhabitants*) of Virginia, residing in the county (or *corporation*) aforesaid, respectfully shows (or *show*) that G. H. is a minor child-----years of age, residing in said county (or *corporation*), whom he (or *they*) desire to adopt as his (or *their*) own child, and whose name he (or *they*) desire to have changed from G. H. to G. D., the said child having lived in the home of your petitioners for more than one year and has been visited by a probation officer (or an agent) of the State (or *county or city board of public welfare or other person P. P. designated by the court for that purpose*) that the parents of the said child to-wit, O. H. and M. H., both reside in said county (or *corporation*) and consent to said adoption as shown by their joining in this petition (or *that the parents of the said child are both dead, or are hopelessly insane, or otherwise incapacitated from giving such consent, or who are habitually addicted to the use of drugs or of intoxicating liquors, or have abandoned the said child, or who have lost the custody of said child through the order of a court, or are unknown, and X. Y., guardian of said child, consents to said adoption as shown by his joining in this petition*; or, if one parent only is dead, etc., so state and aver that the other consented by joining in this petition; or if there be no guardian, in lieu of "and X. Y., guardian," etc., say "and there being no guardian for said child, your petitioner (or *petitioners*) pray that the court will

appoint some discreet and suitable person to act in the proceedings as the next friend of said child;" and if the child be of fourteen years of age, add, "and the said child, being over the age of fourteen years, to-wit, of the age of sixteen years, has consented to be adopted as aforesaid, as shown by a writing signed by him and filed herewith")

Wherefore, your petitioner (or *petitioners*) prays (or *pray*) that this court will enter an order granting leave to him (or *them*) to adopt as his (or *their*) own child the said G. H., who shall thereafter be as his (or *their*) own legitimate child as to all legal intents and purposes and capable of inheriting his (or *their*) estate; and directing that the name of the said child be changed from G. H. to G. D., according to the statute in such case made and provided; and that the court may make all such further orders as it may deem proper and lawful in the premises. This ----- day of -----, 192---

C. D. (or C. D. and E. F.)

A. T., Attorney for Petitioner (or *Petitioners*).

NO. 2. CHILD'S CONSENT TO ADOPTION WHERE OVER THE AGE OF
FOURTEEN YEARS.

(*Idem.*)

Virginia, County (or *Corporation*) of -----, to-wit:

I, G. H., a minor child over the age of fourteen years, to-wit, of the age of sixteen years, residing in the county (or *corporation*) aforesaid, do hereby consent to be adopted by C. D. (or *C. D. and E. F., his wife*) as his (or *their*) own child, according to the tenor and prayer of the foregoing petition, and the statute in such case made and provided. This ----- day of -----, 192--- G. H.

By Acts 1922, amending section 5333 of the Code, this consent must be "duly acknowledged," see Acknowledgements.

ADULTERATIONS

- §1. As to foods, drinks, drugs, candies, and other eatables for man or beast. See *Pure Food and Drug Laws*.
- §2. As to millfeed, etc.
- §3. As to stock and poultry foods and powders
- §4. As to flour; deception as to meal
- §5. As to imitation butter
- §6. As to milk for making cheese, etc.
- §7. As to vinegar
- §8. As to cider
- §9. As to candy
- §10. As to ice cream and milk.

§11. As to meats

§12. As to fertilizers and lime

Aside from ample laws providing for the appointment by the Governor of inspectors, where necessary, in the several counties, cities, and towns of the State, for the inspection of flour, corn meal, bread, salt, fish, pork, beef, tar, pitch, turpentine, lumber, hemp, butter, and lard (see Code, §§1400 etc), we have stringent laws to prevent the adulteration or misbranding of the following articles:

§1. **As to foods, drinks, drugs, candies, and other eatables for man or animal.**—See *Pure Food and Drug Laws*, and Code, §§1155, etc., and 1655, etc.

§2. **As to millfeed, etc.**—It is unlawful “to manufacture for sale, or knowingly to sell or offer for sale, as millfeed, millstuff, bran, brown stuff, or shipstuff, any article or product composed of ingredients other than the bran of corn, wheat, or other cereal grain”. The punishment is a fine of \$10 to \$200. (Code, §1196.) See, also, *Pure Food and Drug Laws*.

§3. **As to stock and poultry food and powders.**—The law provides that the dairy and food commissioner of the State shall cause an examination and analysis to be made of all such foods and powders, before they are offered for sale in Virginia, and the manufacturer, importer, agent, or jobber (and in case he does not, then the seller) is required to pay annually to the said commissioner an inspection fee of \$20 for each brand of same, whereupon the said commissioner issues a certificate granting him the right to sell the same in Virginia, provided the packages are properly labeled, and the foods and powders do not contain any deleterious or harmful ingredient when used for the purpose intended. The punishment for violation of this law is a fine of \$20 for the first offense, and for each subsequent offense, not over \$100, or jail not over 3 months, or both. (Code, §§1245-9.)

For chapter as to “Stock Foods”, see Code, §§1229-49. See also, *Pure Food and Drug Laws*.

§4. **As to flour; deception as to meal.**—Adulterated wheat flour by the addition of corn starch, corn flour, barley flour, or other adulteration, is forbidden, unless

the same is plainly branded, stamped, or marked with the words "combination" and beneath this word the name and percentage of each ingredient given. Any person having anything to do with such adulterated flour, not so marked, is punishable by fine of \$25 to \$100, or by jail not less than 60 days, or both. Possession of the combination flour, not so marked, is *prima facie* evidence of guilt. (Code, §1194.)

The sale of meal as "Virginia meal" when it is not, is punishable by fine of \$10 to \$200, or by jail not over 6 months; and possession of such meal is *prima facie* evidence of guilt. (Code, §1195.)

§5. As to imitation butter.— See Code, §§1198-1203.

§6. As to milk for making cheese, etc.— It is unlawful to supply to any cheese or butter manufactory any diluted (with water), adulterated, or skimmed milk; or to keep back the strippings, or to supply tainted or partly soured milk to a cheese manufactory; or for the manufacturer to use or to direct any employees to use for his or their individual benefit, any cream brought to him, without the owner's consent. The penalty is a forfeiture of \$25 to \$100 to the party defrauded. (Code, 1197.) See, also, *Pure Food and Drug Laws*.

§7. As to vinegar.— Lawful vinegar must have at least $4\frac{1}{2}$ per cent. by weight of absolute acetic acid, or if cider vinegar (i. e., vinegar made of pure apple juice) it shall also have not less than 2 per cent. by weight of cider vinegar solids upon full evaporation over boiling water; all vinegars with less than said per cents are forbidden, as well as all imitations of cider vinegar or vinegars sold or offered for sale as cider vinegar when it is not. And no vinegar shall contain any portion of lead, copper, sulphuric acid, or other ingredients injurious to health, or any artificial coloring matter. Cider vinegar shall be plainly branded with the manufacturer's name and place of business and the words "Cider Vinegar". A false brand is forbidden. Any offender against the vinegar law is punishable by fine of \$50 to \$100. (Code, §1191.) See, also, *Pure Food and Drug Laws*.

§8. As to cider.— Pure apple cider shall be so labeled or branded, and shall be composed of nothing but pure apple juice and necessary ingredients for preserving the same. All other cider shall be labeled or branded with the words "Chemi-

cal Cider". Any offender against the cider law is punishable by fine of \$20 to \$50. (Code, §1192.) See, also, *Pure Food and Drug Laws*.

§9. **As to candy.**— See Code, §1193.

§10. **As to ice cream and milk.**— See Code, §§1215-17.

§11. **As to meats.**— See Code, §§1183, 1219-28.

§12. **As to fertilizers and lime.**— See Code, §§1110-37, and Acts 1920, p. 107, amending §§1110-13, 1119, 1134, and repealing §§1116, 1126-31.

§13. **As to insecticides and fungicides.**— See Acts 1922, p. —.

ADULTERY, FORNICATION, AND OTHER LEWDNESS

See *Abduction*

- §1. Adultery and fornication.
- §2. Lewd and lascivious cohabitation; and open and gross lewdness.
- §3. Keeping house of ill-fame.
- §4. Aiding or permitting prostitution, or keeping assignation house; punishment.
- §5. Examination and committal to city farm or hospital, of prostitutes, etc.
- §6. Pandering or "White Slave Traffic."
- §7. Buggery, how punished.
- §8. Form of "description" in warrant or indictment.

§1. **Adultery and fornication.**— In Virginia, adultery is sexual connection by a married person with one who is not his or her wife or husband; while fornication is such by an unmarried person. Punishment, fine not less than \$20; but if the offense be with a near relative whom he or she is forbidden to marry (see *Marriage*), fine not over \$500 or jail not over 12 months, or both. (Code, §§4543, 4782.) The prosecution may be against one or both at same time.

If a husband conspire or plot with another to cause his wife to commit adultery, and any act is done in furtherance of such plan or plot, it is a felony, and the husband is punished by penitentiary 5 to 10 years, and the other person, 3 to 5 years. (Code, §4544.)

Adultery is also a civil injury, for which large exemplary, or punitive damages are allowed. (4 Min. Inst. 520-5.)

§2. Lewd and lascivious cohabitation; and open and gross lewdness.—"Lewd and lascivious cohabitation" is where two persons, not married to each other, "lewdly and lasciviously associate and cohabit together",—i. e., dwell and live together in the same house as husband and wife, in a state of adultery or fornication. "Open and gross lewdness and lasciviousness", is where persons, married or not, are openly guilty of a single act of adultery or fornication, indecent exposure of one's person, or other act of gross lewdness. The punishment of either offense is a fine of \$50 to 500; and upon a second or subsequent conviction, jail 6 to 12 months. (Code, §4545.) The prosecution may be against one or both at same time.

§3. Keeping house of ill-fame.—It is a misdemeanor to keep a house of ill-fame, resorted to for the purpose of prostitution or lewdness, i. e., a house kept, and resorted to by more than one, for illegal sexual intercourse. Punishment, jail not over one year and fine not over \$200. The general character of the house may be given in evidence. (Code, §4548.)

§4. Aiding or permitting prostitution, or keeping assignation house; punishment.— By Acts 1918, p. 436: "(1) It shall be unlawful for any person to frequent, reside in or visit, for immoral purposes, any house of ill-fame, brothel or bawdy house or any place within or without any building or structure within this State, which is used or is to be used for lewdness, assignation or prostitution.

(2) That it shall be unlawful for any person, firm or corporation or any officer, employee or agent thereof, with knowledge or good reason to believe the immoral purpose of such visit, to take or transport or assist in taking or transporting, or offer to take or transport on foot or in any way, any person to a place, whether within or without any building or structure used or to be used for the purpose of lewdness, assignation or prostitution within this State; or to procure or assist in procuring for the purposes of illicit sexual intercourse, or to give any information or direction to any person with intent to enable such person to commit an act of prostitution.

(3) It shall be unlawful for any person to keep any house of assignation, or bawdy house, or any place where persons may meet for the purpose of prostitution or illicit or illegal intercourse in this State, and each and every day such assignation house, or bawdy house, or place shall be kept, or any prostitute kept or harbored or permitted to remain therein for immoral purposes, shall constitute a separate offense.

(4) It shall be unlawful for any owner or chauffeur of any jitney, jitney bus, automobile, motor car, or other vehicle, with knowledge or reason to believe the same to be used for immoral purpose, whether drawn by animal or motive power, to use the same or to allow the same to be used, for the purposes of prostitution or illicit or illegal sexual intercourse or to aid or promote such prostitution, illicit or illegal sexual intercourse by the use of any such jitney, jitney bus, automobile, motor car or other vehicle, whether drawn by animal or motive power.

(5) For each and every violation of this act or any section thereof, the defendant, upon conviction, shall be fined not more than five hundred dollars, or imprisoned for not more than twelve months or both."

§5. Examination and committal to city farm or hospital, of prostitutes, etc.—By Acts 1918, p. 670: "Any person convicted by any court or justice of this State, of prostitution or of being a keeper, inmate or frequenter of a house of ill-fame, prostitution or assignation, or of soliciting for immoral purposes, shall be subjected to a physical examination for contagious venereal disease by the local board of health of the county or city in which such person is convicted, or by a competent physician appointed and designated by the trial justice or court, and no such person shall be released until pronounced by said board, or physician, not dangerous to the community on account of such venereal disease. Any person convicted of being a prostitute, keeper or inmate of a house of ill-fame, prostitution or assignation, or soliciting for immoral purposes, shall not be fined but shall be committed to a city farm or hospital as in the discretion of the court or justice is deemed best, or in case there is no city farm or hospital in which such convicted person can be confined, such person shall be committed to jail."

§6. Pandering, or "White Slave Traffic;" punishment.—

By section 4579 of the Code: "(1) Any person who takes, harbors, inveigles, entices, persuades or encourages, either by threats or promises, or by any device or scheme takes, or causes to be taken, any female into a house of ill-fame or of assignation, or elsewhere, against her will, for the purpose of prostitution or illegal sexual intercourse; or, takes or detains a female unlawfully against her will with the intent to compel her, by force threats, persuasion, menace or duress, to marry him or to marry any other person, or to be defiled; or, being parent, guardian or any other person having legal charge of the person of a female, consents to her being taken or detained by any person for the purpose of prostitution or sexual intercourse, is guilty of pandering, and shall be punished by confinement for a term of not less than one year nor more than ten years in the penitentiary, and by a fine of not more than \$1,000.

(2) Any person who shall place any female in the charge or custody of any other person or persons for immoral purposes, or in a house of prostitution, with the intent that she shall live a life of prostitution, or any person who shall compel any female to reside with him, or with any other person for immoral purposes, or for the purposes of prostitution, or compel her to live a life of prostitution, is guilty of pandering, and shall be punished by a fine of not less than \$1,000 and by confinement in the penitentiary for not less than one or more than ten years.

(3) Any person who shall receive any money or other valuable thing for or on account of procuring for or placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons, shall be guilty of a felony, and upon conviction thereof shall be confined in the penitentiary for not less than one year nor more than ten years.

(4) Any person who, by force, fraud, intimidation or threats, places or leaves, or procures any other person or persons to place or leave his wife in a house of prostitution or to lead a life of prostitution, shall be guilty of pandering, and upon conviction thereof shall be confined in the penitentiary not less than three nor more than ten years.

(5) Any person or persons who shall knowingly receive any money or other valuable thing from the earnings of any female engaged in prostitution, except for a consideration deemed good or valuable in law, shall be guilty of pandering, and on conviction be confined in the penitentiary for a term not less than one year nor more than ten years, and fined not more than \$500.

(6) Any person or persons who shall detain any female in a disorderly house or house of prostitution because of any debt or debts she has contracted, or is said to have contracted, while living in said house of prostitution or disorderly house, shall be guilty of felony, and on conviction thereof shall be confined in the penitentiary for a term not less than one year nor more than ten years.

(7) Any person or persons transporting, or attempting to transport by any railroad, steamboat, railway, or by any other means of conveyance, through or across this State, any female for the purposes within the intent of this section, may be presented, indicted, tried and convicted in any county or city in which any part of said transportation may have taken place.

(8) Any female hereinbefore referred to shall be a competent witness in any prosecution under this section to testify to any and all matters, including conversations with the accused or by him with third persons in her presence, notwithstanding she may have married the accused either before or after the violation of any of the provisions of this section, but she shall not be compelled to testify after such marriage."

§7. Buggery; how punished.— See *Buggery*.

§8. Form of "description" in warrant or indictment.—

No. 1. ADULTERY BY A MARRIED MAN WITH A SINGLE WOMAN.
(Code, § 4543.)

DESCRIPTION:

"did commit adultery with one E. F., by having carnal knowledge of the body of her the said E. F., he the said C. D., then being a married man and having a lawful wife, J. N., living."

No. 2. ADULTERY BY A MARRIED MAN WITH A MARRIED WOMAN.
(*Idem.*)

DESCRIPTION:

"did commit adultery with one E. F., by having carnal knowledge of

the body of her the said E. F., he the said C. D. then being a married man and having a lawful wife, M. E., living, and she the said E. F. then being a married woman and having a lawful husband, G. F., living."

No. 3. FORNICATION.

(Idem.)

DESCRIPTION:

"being then an unmarried man, did commit fornication with one E. F., by having carnal knowledge of the body of her the said E. F., she being an unmarried woman."

No. 4. CONSPIRACY BY HUSBAND TO CAUSE WIFE TO COMMIT ADULTERY.
(Code, § 4544.)

DESCRIPTION:

"the said C. D., then being the lawful husband of one M. E., unlawfully did conspire with one C. T. to cause his said wife M. E. to commit adultery, for the purpose of enabling the said C. D. to procure a divorce from his said wife M. E. (or for any other purpose), and in furtherance of the said conspiracy (here state some act done)."

No. 5. CONSPIRACY WITH HUSBAND TO CAUSE WIFE TO COMMIT ADULTERY.
(*Idem.*)

DESCRIPTION:

"unlawfully did conspire with one O. P., then the lawful husband of one E. R., to cause the said E. R., the wife of the said O. P., to commit adultery, for the purpose of enabling the said O. P., to procure a divorce from his said wife E. R. (or for any other purpose), and in furtherance of the said conspiracy (here state some act done)."

No. 6. KEEPING A HOUSE OF ILL-FAME.
(Code, § 4548.)

DESCRIPTION:

"as well as on divers other days and times thereafter unlawfully did keep and maintain, and does now keep and maintain, a certain house of ill-fame, resorted to during all that time, and now resorted to, by divers idle and dissolute persons, both men and women, for the purpose of prostitution and lewdness."

No. 7. LEWD AND LASCIVIOUS COHABITATION.
(Code, § 4545.)

DESCRIPTION:

"and thereafter until the ----- day of -----, 192--, did lewdly and lasciviously associate and cohabit together, they the said C. D. and J. N., during all that time not being married to each other."

ADVANCEMENT

No. 8. OPEN AND GROSS LEWDNESS.

(Idem.)

DESCRIPTION:

"was guilty of open and gross lewdness and lasciviousness with one E. F. by [here state the act of lewdness]."

ADVANCEMENT

An advancement is a gift by a parent in his lifetime to a child or descendant, for the purpose of advancing him in life, of the whole or a part of what it is supposed such child or descendant will inherit on the death of the parent. By statute (§5278), where a child or descendant of a person dies without a will, or has failed to will all of his estate, if such child or descendant shall have received from such person in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he, or any descendant of his desires to come in equally with the other heirs in the partition or distribution of his estate, such advancement shall be considered a part of the estate, real and personal, which has not been willed, and such child or descendant, being charged with the value of such advancement at the time it was made, without interest or profits, or, which is the same thing, putting such advancement in with the estate, comes in to an equal distribution of the estate with the other heirs. This bringing of advancements into the general estate is called in law bringing into "hotchpot".

If one does not bring in his advancement, he cannot participate in the division of the estate; but he need not bring his advancement in unless he desires to do so. This he would not do where the advancement is of greater value than what he would get in the division or distribution of the estate.

Whether a gift by a father in his lifetime to a child is an absolute gift or advancement, is a question of intention of the parent; and it is prima facie presumed to have been so intended (even where a gift is made to a son-in-law), where the gift is adapted to advance the child in life. The statements and declarations of the parent made at the time of the gift, or subsequently, are competent evidence to show his intention.

The surrounding facts and circumstances or the character of the gift itself, may rebut the presumption. Thus, a present, when the father has lived a considerable time with the child, or when the child has otherwise rendered valuable service, is considered a satisfaction for trouble, and not an advancement; and petty sums of money at different times, while the child is yet at home with the father, and clothes, a watch, a riding horse, expenses of maintenance, general education, traveling expenses, and such like gifts, are, in general, not advancements. But otherwise, where the gift is substantial and adapted to advance him in life, as, money furnished to set him up in business, or, perhaps, to give him a professional education, a deed to property, the payment of the purchase price of property deeded to the child, a loan afterwards given by will or otherwise, a release or canceling of bonds of a child, and such like gifts.

In some cases an advancement is deemed a satisfaction of what is given a person under a will. The law (§5237) provides that a provision for or an advancement to any person shall be deemed a satisfaction in whole or in part of a gift to such person contained in a previous will, if it would be so deemed in case the person were the child of a party making a will; and whether he be a child or not, it shall be so deemed in all cases in which it shall appear from oral or other evidence to have been so intended.

Where a gift is made to a child by a will and afterwards an advancement is made to that child, such advancement shall be taken as a satisfaction of the gift to the extent of the advancement made, yet this presumption may be rebutted by evidence. But when the gift is before the making of the will, and the will does not refer to it as an advancement, it will not be so considered. And even though the property advanced and the property given by will are not of the same class or kind, the one may be the satisfaction of the other, if it appear that it was so intended (See 1 Min. Real Prop., §§948-54.)

ADVERSE POSSESSION

§1. Title by adverse possession

§2. Essentials of adverse possession:

- (1) The possession must be actual
- (2) The possession must be exclusive
- (3) The possession must be uninterrupted
- (4) The possession must be open and notorious
- (5) The possession must be under color or bona fide claim of title

§3. Extent of adverse possession

§4. Title by prescription

§1. **Title by adverse possession.**—Title to land may be obtained by adverse possession for 15 years if the land lies west, and 10 years if east, of the Alleghany Mountains, Carroll County being considered as wholly west. (Code, §5805.)

§2. **Essentials of adverse possession.**—To constitute adverse possession, the possession must be actual, exclusive, uninterrupted, open, and notorious, under a color or bona fide claim of title:

(1) *The possession must be actual.*—i. e., there must be actual occupation of some part of the land, or the use or enjoyment of some part thereof by acts of ownership equivalent to such actual occupation. But where the person owns land under a first patent from the commonwealth, the law considers him as in actual possession. Where, however, a subsequent person claims, his possession must be actual. But this does not mean that the land should be enclosed or built upon, or actually cultivated or cleared, but the entry on the land must be made with intention of taking possession, and be accompanied with such visible acts of ownership as from their nature indicate a notorious claim of the land. While lands remain uncleared or in a state of nature they are not susceptible of adverse possession, except by acts of ownership affecting a change in their condition, which from their nature indicate a notorious claim of title. The actual possession is usually by residence, cultivation, improvement, or other open, notorious, and habitual acts of ownership, as in case of townsmen claiming woodland in a vicinity from which he openly, notoriously, and habitually cuts and hauls wood or in case of a uninclosed or improved lot in or near a city, used as coal or lumber yard, quarry, etc.

(2) *The possession must be exclusive*,—i. e., no one else must have possession with him.

(3) *The possession must be uninterrupted*,—i. e., continue unbroken for the prescribed period.

(4) *The possession must be open and notorious*.—So the true owner may be presumed to know of his claim of title.

(5) *The possession must be under color or bona fide claim of title*.—It is immaterial whether the claim of title is good or bad, legal or equitable. Color of title, it seems, is a deed or other writing under which a party claims. The possession of a mere intruder or squatter, without pretense of color of title, is not sufficient. (See 2 M's Real Prop., §§1025-40.)

§3. Extent of adverse possession.—In the case of a rightful owner, the possession of part is the possession of the whole, except when an actual adverse possession can be proved. Thus, a man dwelling on his farm is as truly in the actual possession of his woods and waters, as of his pastures, fields, and gardens. If an adverse claimant enters upon his lands, but does not expel him, the possession which he gains does not outreach the limits of his enclosure. Where one enters under a color of title by deed or other writing he acquires an actual possession to the extent of the boundaries contained in the writing, and this is true even though the writing be worthless. Where one enters not under any deed or writing, but merely takes possession under a claim of title, his possession extends no further than what he occupies, cultivates, encloses, or otherwise excludes the owner from.

In cases of conflicting possession, the law provides that "possession of part shall not be construed as possession of the whole, when an actual adverse possession can be proved". (Code, §5470.) Thus, in the case of interlocks, the law is as follows: (1) Where there is an interlock between a senior and a junior patent, and there has been no actual possession by the former, possession of the interlock by the latter, accompanied by a claim of title to the whole of the land covered by his patent, is possession of the whole; but if his settlement be outside the interlock, or if there be no settlement, he acquires possession of only that part of the land within his grant, which is outside the interlock (105 Va. 801). (2)

Where a senior titleholder settles upon any portion of his land claiming title to the whole, whether inside or outside of an interlock, before the junior title-holder has settled upon any part of the interlock, the former is in possession to the extent of his grant, and the subsequent entry of the latter upon the interlock ousts the other only to the extent of the land actually in the occupancy of the junior title-holder by residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership (98 Va. 417).

There is no adverse possession in the following cases: (1) Where the parties claim under the same title; (2) where the possession of one party is consistent with the title of the other, as, in the case of landlord and tenant, principal and agent, trustee and beneficiary, mortgagor and mortgagee, etc.; (3) where the party claiming title has never, in contemplation of law, been out of possession, as, in the case of joint occupants or owners, unless indeed in the case of actual ouster, or some other act amounting to total denial of the other's right (Code, §5466); or in the case of lessor and lessee; and (4) where the one in possession has acknowledged a title in the other party. (See 2 M's Real Prop., §§1041-8.)

§4. Title by prescription.—Adversary possession and the statute of limitations as hereinbefore treated, applies to the possession of lands; while prescription is the adverse possession or use of a right of way, or other easement or intangible interest in real estate—see *Easements*. In Virginia, title by prescription is presumed after 20 years of honest, uninterrupted, notorious, exclusive, and adverse enjoyment, like in the case of adversary possession above. (See 2 M's Real Prop., §§1054-68.)

AFFIDAVIT

- §1. Who may administer oaths and take affidavits
- §2. Affidavits by corporations and agents
- §3. Fees for taking and certifying affidavits
- §4. Forms of affidavits

§1. Who may administer oaths and take affidavits.—

In Virginia, unless of such a nature that it must be made in court, an oath may be administered by or an affidavit made before a justice of the peace, a notary public, a commissioner in chancery, a court by its judge, a clerk of a court, or his deputy, a clerk of a city council, common council, or board of aldermen, a commissioner appointed by a Governor of another state, or, in case of a survey directed by a court, the surveyor directed to make the survey. (Code, §§274, 3389, 2701.) Where a person declares he has religious scruples as to the propriety of taking an oath he may instead make a solemn affirmation. (Code, §278.) In the case of an affidavit, a notary need not state when his commission expires, as he is required to do in the case of acknowledgments.

An affidavit is an oath or affirmation reduced to writing, sworn or affirmed to before some officer having authority to administer it.

Out of Virginia, an affidavit may be made before any authorized officer of such state or country, and must be signed by such officer, and there must be annexed thereto a certificate of the clerk or any other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath; but in case of a notary, it need only be signed by him under his official seal, no other certificate being necessary. (Code, §275.)

§2. Affidavits by corporations and agents.—By section 276 of the Code: "An affidavit by or for a corporation may be made by its president, vice-president, general manager, cashier, treasurer, or a director, without any special authorization therefor, or by any person authorized by a majority of its stockholders or directors to make the same; and when an affidavit is made by any person other than the principal authorized by law to make it, such person shall be deemed to have been the agent of the person so authorized until the contrary is made to appear." See, also, *Corporations*, section 15.

§3. Fees for taking and certifying affidavits.—A notary or other officer taking affidavits of witnesses, should state at the foot thereof his fees. The fee of a justice, notary, or commissioner for administering and certifying an oath, is 25 cents; in case of affidavits of witnesses, \$1.00 for the first

hour or part thereof, and at the rate of \$1.00 for each additional hour. (Code, §§3480; §3481, as amended by Acts 1920, p. 804; and §3482.)

§4. Forms of affidavits.

No. 1. GENERAL FORM OF AN AFFIDAVIT.

Virginia, County (or *corporation*) of _____, to-wit:

This day, A. B. personally appeared before me, J. T., a justice of the peace (or *notary public*, or *clerk of the* _____ *court*, or *commissioner in chancery of the* _____ *court*), for the county and state aforesaid (or "before J. T., a surveyor directed by the _____ court of said county to execute an order of survey in the cause of O. P. v. X. Y., pending in said court"), and made oath (or *affirmation*) that the following facts are true to the best of his knowledge and belief: (here insert the facts sworn to).

Given under my hand, this the _____ day of _____, 192__.

J. T., J. P. (or other official).

NOTE:—The person making the affidavit, usually raises his right hand, and the officer administers the oath as follows:

"You do solemnly swear (or *affirm*) that this statement (account, or whatever it may be) is true, so help you God (leaving off "so help you God," in case the party merely affirms); to which the party answers, "I do."

No. 2. ANOTHER FORM OF AN AFFIDAVIT.

I, A. B., of the county (or *corporation*) of _____, in the state of _____, being duly sworn (or *affirmed*), upon oath (or *affirmation*), do depose and say as follows, to the best of my knowledge and belief: (Here insert the facts sworn to). This _____ day of _____ 192__.

A. B.

Virginia, County (or *corporation*) of _____, to-wit:

Sworn to (or *subscribed and sworn to*) by A. B., before me, in my county (or *corporation*) aforesaid, this the _____ day of _____ 192__.

J. T., J. P. (or other officer).

Or

Sworn to by A. B., before me, J. T., a justice of the peace (or other officer) of _____ county (or *corporation*), in said county (or *corporation*), this the _____ day of _____, 192__.

J. T., J. P. (or other officer).

AFFRAY

See Riot, Rount, and Unlawful Assembly

§1. Definition and punishment

§2. How suppressed

§3. Form of "description" in warrant or indictment

§1. Definition and punishment.—An affray (from a word meaning to frighten) is a common law misdemeanor, in Virginia, and is the fighting of two or more persons in a public place to the terror of the people; or the appearing in public armed with dangerous and unusual weapons, in such a manner as to cause such terror; and is punishable by statute (§4782) by a fine of not over \$500, or jail not over 12 months, or both.

§2. How suppressed.—A private person may and a conservator of the peace (e. g., a judge, justice, commissioner in chancery, sheriff, constable, or notary) must, in view or hearing of an affray, part the combatants, intercept others coming to their aid, and arrest the affrayers, and for this purpose an officer may break open doors. He may command the aid of bystanders, and if they refuse, they are punishable by a fine of not over \$100 and jail not over 6 months (Code §§4511-12). If the affray occur out of his presence or hearing, such officer cannot arrest without a warrant, though he may carry before justice those whom the persons present at the affray have taken; and if the arrest be made by a police officer of a city or town while in the discharge of his duty, a warrant is not necessary, even upon trial, unless demanded (Code, §4991.) A conservator cannot lay hands on those who contend with mere hot words, without any threats of personal violence, but if he see persons upon the very point of entering into an affray, as, where one shall threaten to kill, wound, or beat another, he may carry the offender before a justice to find sureties of the peace; and, perhaps, he may imprison him of his own authority for a reasonable time till the heat shall be over; but (unless in said instance) the officer has no power to imprison. and the safer course is, in case of arrest, forthwith to take the offender before a justice.

If a person in the presence of a court or a conservator of peace, make an affray, or threaten to kill or beat another, or to commit violence against his personal property, or contend with angry words to the disturbance of the peace, he may, without process or other proof, be required to give a bond to keep the peace (Code, §4796).

§3. Form of "description" in warrant or indictment.

No. 1. AFFRAY BY FIGHTING.

(Code, § 4782.)

DESCRIPTION:

"at a public place, together with one D. E., did tumultuously and to the terror of the people, make an affray wherein the person of the said A. B. was beaten and abused by them the said C. D. and D. E., without any lawful or sufficient cause given to them or either of them by the said A. B."

Under this form conviction may be had for *assault and battery*.

No. 2. AFFRAY BY APPEARING IN PUBLIC ARMED.

(*Idem.*)

DESCRIPTION:

"did make an affray by then and there unlawfully appearing in public armed with a dangerous and unusual weapon, to-wit: (here name the weapon), to the great terror and disturbance of the people of this Commonwealth."

AGE

See Minors, Etc.

- §1. Adult; minor
- §2. Responsibility for crime
- §3. Ages in other cases

§1. Adult; minor.—To be an adult one must be 21 years old, which occurs on the first moment of the day of his 21st birthday, and not on the preceding day as commonly stated. Under 21, he is a minor.

§2. Responsibility for crime.—See *Criminal Law and Procedure*.

§3. Ages in other cases.—As to marriage, the boy must be 14 and the girl 12, before they are capable of consenting. but if under 21, they must have consent of parent or guardian. At 14 a girl or boy may choose a guardian. As to a will of personal property, the age is 18. To vote or hold office generally, a person must be 21, except a notary must be 18; the Governor, 30; a congressman, 25; a U. S. senator, 30; and the President, 35. The age for state military service is 18 to 45;

for enlistment in the U. S. army, 21 to 35, in U. S. navy, over 18, without consent of parent or guardian, but under 18, with such consent. A person over 60 is exempt from compulsory jury service. The school age for pupils, is 7 to 20; teachers must be 18. As to apprenticeship, a girl is bound until she is 18, and a boy, until 21—see *Apprenticeship*.

AGENTS AND AGENCY

- §1. Definition and classes
- §2. Appointment of agent; ratification
- §3. Authority of agent
- §4. Agents, "general" and "special"
- §5. Agent's liability to his principal
- §6. Agent's liability to third persons:
 - (1) Where contract is in agent's own name
 - (2) Where the principal is not disclosed
 - (3) Where the agent exceeds his authority
- §7. Principal's liability to third persons
 - (1) Where principal's name not given
 - (2) Where principal's name is given
 - (3) Liability for wrongs
- §8. When agency terminated or ended:
 - (1) By self limitation
 - (2) By death, insanity, or bankruptcy
 - (3) By the principal
 - (4) By the agent

§1. Definition and classes.—In law, an agent (sometimes called servant or employee) is one authorized to act for another, called the principal (or master or employer), and the relation between them is known as agency. The law of agency is based upon the maxim, that he who does an act through another is deemed in law to do it himself; or, more briefly, he who acts through another acts through himself. Agency enters into nearly all of the relations of life; and nearly every one of us every day acts as the agent of some one else, either as clerk, lawyer, auctioneer, broker, commission merchant, or factor, commercial traveler, or book, sewing machine, rental, or labor agent, or in some other capacity. Corporations act

entirely by agents,—officers, clerks, etc. A minor may be an agent, but he may end the agency at any time.

The following professional agents are treated under their respective heads:

(1) Commission merchant, or factor, who is one who receives goods or merchandise from the owners to sell on commission. See *Commission Merchant or Factor*.

(2) Broker, who is one whose business is to bring parties together to contract, or in their name to contract for them. in some line of business, as, stock broker, insurance broker merchandise broker, money broker, real estate broker or agent. etc. See *Brokers*, and *Real Estate Agent*.

(3) Auctioneer, who is one who represents the owners of property in selling the same to the highest and best bidder. See *Auction and Auctioneer*.

§2. Appointment of agent; ratification.—An agent may be appointed orally or in writing, sometimes by a power of attorney (see *Power of Attorney*).

To execute a deed or other writing under seal, his authority must be under seal. A writing, however, under seal, signed and sealed by the agent in the principal's name, in his presence and by his request, binds the principal. But a contract required by law to be in writing (Code, §5561), as a contract for the sale of land, etc., cannot, it would seem, be executed by an agent without written authority from his principal (Chapman's case, 24 S. E. 261; but see Davis' case, 87 Va. 559).

An agency may also be implied from the conduct and relations of the parties, e. g., if one is repeatedly directed to do certain things, or does them without direction, but with the knowledge and consent of the principal, persons dealing with him in that way, can hold the principal bound.

If one acts as an agent for a named principal, without authority, the principal may adopt, affirm, or ratify the act. If a ratification is made under amistake of any material fact, it is not binding. A principal cannot ratify part and reject the rest. If an agent exceeds his authority, the principal on discovering the facts must promptly repudiate the act, otherwise a ratification will be inferred, as it will be, also, if he accepts the benefits of the act. Subsequent ratification is

equivalent to prior authority, and when once made it cannot be withdrawn. (See 1 Min. Inst. 226-8.)

§3. Authority of agent.—His authority depends upon the terms of his appointment or employment. Some employments give wide latitude of power, leaving much to the agent's discretion; others give a very limited authority. An agent has authority to do all that is necessary or usual in the business for which he is employed. It is specially provided that an agent to conduct a mercantile business "shall be conclusively presumed to have the right to buy and sell upon a credit and to do any and all acts in the conduct of such business that his principal could do, unless his appointment shall be in writing, duly acknowledged, setting forth fully the restrictions upon his powers and recorded in the deed book, in the clerk's office of the county or corporation in which such business is conducted, and unless a copy of such power be conspicuously posted in the place of business conducted by such agent". (Code, §5223.)

Secret or private instructions to an agent, though binding as between themselves, have no effect on third persons not knowing of them, and so do not, as to such persons, limit the agent's authority.

Custom or usage of the trade or business, when reasonable, uniform, and notorious, and not contrary to law, is a part of an agent's authority.

Where an agent is selected for his ability or integrity, and his business requires the exercise of discretion, he cannot delegate his authority to another, unless such power is conferred expressly by the principal, or is afterwards ratified by him, or is implied, as, where the business is of such a character that it requires such delegation, or where the custom and usage of the trade or business is to employ sub-agents. But an agent may delegate to a sub-agent the doing of acts merely mechanical, clerical, or ministerial, involving no judgment or discretion. (See 1 Min. Inst. 229-31.)

§4. Agents, "general" and "special."—Depending upon the extent of his authority, an agent is either general or special—general, where he is authorized to transact all his principal's business, or all his business of a particular kind, as, managing a store, renting houses, or other business; and

special, where he is authorized to do one or more specific acts for his principal in pursuance of particular instructions, as, to buy or sell a house, collect a note, or the like. This distinction is important as to the extent of liability of the principal for the acts of his agent. If a general agent exceeds his authority, the principal will nevertheless be bound, if the act is within the apparent scope of the agent's authority and such an act as is natural and usual in transacting business of that kind. Appointing him to do that business, is saying to the world that he has all authority necessary to transact it in the usual way. A general agent to sell, may do whatever is usual or customary in that market to carry out the object of his agency. Thus, a general agent to sell personal property has power to make such warranties with reference to the property as are usual and customary in the like sales in that locality. A secret restriction to the agent as to warranties, is not binding on the buyer. But a rental agent cannot, without special instructions, sue out a distress warrant. On the other hand, in the case of a special agent, he who deals with him is bound to look to his authority; and if he exceeds or disobeys his instructions, the principal is not liable. (See 1 Min. Inst. 229-30.)

§5. Agents liability to his principal.—An agent is bound to the utmost good faith and zeal toward his principal. He must not take any secret advantage of his principal, as, by also representing the other party to the transaction, in which case, he loses his compensation, and the deceived party may avoid the agreement, unless, indeed, both parties consent to the double agency; neither must he buy from or sell to himself, or take any secret profits or benefits. It is his duty to obey instructions, and to use reasonable diligence, care and skill, otherwise he is liable in damage. (See 1 Min. Inst. 244-5.) It is specially provided (Code, §5406) that if he "by his negligence or improper conduct lose any debt or other money", he is to be charged with the amount, with interest.

§6. Agent's liability to third persons.—An agent is mediator between two parties, and when his mediation is finished, he drops out, and no liability attaches to him. When he does become liable, it is in the following cases:

(1) *Where contract is in agent's own name.*—A contract

ought to show that it is the contract of the principal through the agent, otherwise the agent is liable. If the words of promise be those of the agent, they bind him, even though he annexes the word "agent". Thus, "I as agent for P. promise", "I in behalf of P. promise", "I promise that P. shall", etc., are all personal promises of the agent. Where all of the contract is in the name of the principal, as it should be, it may then be signed either as "P. by A., agent", or "A., agent for P". Where the contract, in the body of it, instead of saying the principal promises, says "I promise", or "we promise", the mode of signing is most material. If it is signed "P. by A., agent", the principal is bound. But if it is signed "A., agent for P.", the agent is bound, and he alone if the promise is under seal, but if the contract is not under seal the principal will also be liable if the contract redounds to his benefit, except in cases where the contract exceeds the agent's authority or the credit was given solely and expressly to him. And even where the credit is given to the agent, if it be in ignorance of whom the principal is, although with acknowledgment that the agent is acting for someone, and much more if without such knowledge, the principal, when discovered, is liable. The foregoing rules apply, whether the agent be president, director, member of the committee of an association, incorporate or otherwise. (See 1 Min. Inst. 234-8.) But in the case of conveyances, the law (§5145) provides if in a deed made by one as attorney in fact, i. e., by an agent under a power of attorney, the words of conveyance or the signature be in the agent's name, it is as much the principal's deed as if the words of conveyance or the signature were in his name by his agent, if it be manifest on the face of the deed that it should be construed to be the principal's deed to give effect to its intent.

But in the case of government agents, they are not liable even though the contract, either under seal or not, be in their own name, unless it clearly appears that he intended to become liable.

The agent is not allowed to show by evidence that he signed as agent and that this was known to the other party. The contract must speak for itself, and he cannot vary a written contract by oral evidence. But such evidence may be used,

where the contract is not under seal, in order to give the principal the benefit of the contract, or to hold him also bound thereby. (See 1 Min. Inst. 234-6.)

(2) *Where the principal is not disclosed.*—Here the agent is liable, and the principal too when discovered, if the contract be not under seal. This liability occurs where the agent makes a fraudulent misrepresentation of his authority, where he knows he has no authority, and where he bona fide believes he has authority but has not. On the other hand, the principal, when the contract is not under seal, may come forward and claim the benefit of his agent's transactions in his behalf, yet not so as to interfere with any rights which may have previously arisen between the agent and a third person. But where one has expressly contracted in writing as principal, another person cannot prove himself to be principal, for that would be to vary the written contract by evidence. (See 1 Min. Inst. 236-7.)

(3) *Where the agent exceeds his authority.*—Here, also, the agent is liable. For a criminal act, the agent alone is liable, unless the principal commands him to commit it, when both are liable.

As to civil injuries or wrongs, called in law torts, committed in the course of the agent's employment, he is personally liable, as the principal also is, unless the tort be wilful or malicious, in which case the principal is excused. An agent is also liable for injuries resulting from his fraud or negligence. (See 1 Min. Inst. 237-8.)

§7. Principal's liability to third persons.—The rule is different where the principal's name is undisclosed, or not given, and where his name is given.

(1) *Where principal's name not given.*—If the principal's name is undisclosed, or not given, at the time of the transaction, but afterwards is discovered, the third person may within a reasonable time elect to hold such principal liable, and his election need not be verbal but may be inferred from his conduct. But if he has already elected to hold the agent, he cannot hold the principal. If the principal has paid money over to the agent to pay a third party, he cannot be held liable. The principal cannot be held liable on a writing under seal, unless it is executed in his name by his agent with authority

under seal, and as to a negotiable instrument, only those in whose name the writing is executed can be held liable thereon. An undisclosed principal cannot be held liable, except where actual authority was previously conferred upon the agent. (See 1 Min. Inst. 225 and seq.)

As to mercantile business, the law (§5224) provides that if a person transacts business as a trader, with the addition of the words "agent" or "factor", and fails to disclose the name of his principal by a conspicuous sign at the place of business, and also by a notice published for two weeks in the local newspaper, if any; or if a person transacts such business in his own name, without the addition of the words "agent" or "factor",—all the property, stocks, bonds, notes, account, etc., acquired or used in such business shall, as to his creditors, be liable for his debts, and this is true even though the creditor knows who the principal is; but this law does not apply to a licensed auctioneer or a commission merchant.

(2) *Where principal's name is given.*—A principal, in whose name a contract is made, is liable to a third person as though he had made the contract in person, provided there was real or apparent authority to do the act, or, there being no such authority, the principal afterwards ratified his agent's act; but the principal is not bound by the unauthorized assertions of authority made by his agent; yet the admissions of the agent are binding on the principal when made in reference to the act which he is authorized to do. Notice given to an agent while acting as such is notice to the principal, and the knowledge of the agent which he possesses at the time of the transaction will be imputed to the principal, unless it is his duty not to disclose it, or he is known to be acting against the principal's interest. (See 1 Min. Inst. 231 and seq.)

As to the rule in case of general and special agents, see section 4, above.

(3) *Liability for wrongs.*—The principal is liable to third persons for wrongs, or torts, committed by an agent within the scope of his authority, as by his fraud, ignorance, unskilfulness, or neglect; but he is not liable for injuries arising from the neglect, unskilfulness, or ignorance of a fellow-servant, except in the case of a railroad company. Neither is he liable for the agent's wilful and malicious torts, except

in the case of common carriers of goods, inkeepers, and a few other exceptions. See *Common Carrier; Death by Wrongful Act, etc.; Employer and Employee; Torts.*

§8. When agency terminated or ended.—An agency may be terminated or ended in several ways, as follows:

(1) *By self-limitation.*—Where the time fixed for the agency has expired, or where the object of the agency is accomplished, the agency of course ceases.

(2) *By death, insanity, or bankruptcy.*—The death, insanity, or bankruptcy of the principal or agent also terminates the agency, except where the agency is coupled with an interest, or is given to secure or effect some benefit besides the agent's compensation, as, where an agent is authorized to sell real or personal property, or to collect a claim and apply the proceeds to the payment of a debt, or is authorized to confess a judgment, etc.; and in the case of the principal's death, the agency (if not coupled with an interest) is ended even though the authority be given for a valuable consideration, for an agent cannot act in the name of a dead man.

The agency is "coupled with an interest" where the estate or interest on which the agent's power is to be exercised passes with the power and vests in the agent, so that he has such an interest or estate in the thing which is the subject of the agency that he can exercise authority over it in his own name,—as, in the case of a deed of trust, which may be enforced after the principal's death.

(3.) *By the principal.*—The principal has power to revoke or end the authority of an agent at any time, except where the agency is coupled with an interest, or where the authority is given for a valuable consideration in order to secure or effect some benefit besides the agent's compensation; and though he has the power, yet he has not the right and is liable for any damages sustained by the breach of his contract of employment,—as, where he revokes the agency after the agent has commenced his work but before the term of the agency has expired, etc. He is not liable where the agent has broken his contract by incompetency or otherwise, nor where he is an agent for an indefinite period, or at the will of either party.

Where the principal revokes an agent's authority he must

give him, and also the public (especially persons accustomed to deal with the agent), notice of the fact. And his bona fide acts until he receives such notice, and the bona fide transactions of third persons with him as agent, in the absence of notice to such persons, or to the public, through newspaper or otherwise, will be binding upon the principal.

An agency may be expressly revoked or ended by writing or word of mouth; or the revocation may be implied from the words and conduct of the principal which show that he intends the agency to cease.

(4) *By the agent.*—The agent has power to renounce or end an agency at any time; but he may not have the right to do so, in which case he is liable in damages. He has the right, and is not liable, where the principal has broken the contract, or where the agency is for an indefinite period, or for a definite period but without consideration, or where it is at the will of either party. He is liable where the agency is for a valuable consideration or if he quits after he has commenced the work of the agency. In all cases where he renounces the agency, he must give notice to the principal; otherwise he will be liable for any damages that may result, especially where his failure to give notice is fraudulent. As to third persons, notice is not usually required in the case of a special agent. (See 1 Min. Inst. 245-50.)

AGRICULTURE

- §1. Board of Agriculture
- §2. Commissioner of Agriculture
- §3. State Live Stock Sanitary Board
- §4. Federal co-operation
- §5. Teaching agriculture
- §6. Analysis of soil and minerals
- §7. Miscellaneous provisions

§1. **Board of agriculture.**—The Department of Agriculture and Immigration of the State is under the management and control of a Board of Agriculture, composed of practical

farmers, one from each congressional district, appointed by the Governor, together with the president of the Virginia Agriculture and Mechanical College and Polytechnic Institute, who shall hold at least three meetings a year, and serve without pay, except expenses. The board has charge of all matters for the promotion of agriculture in the State, may establish experiment stations, and has charge of all the funds of the department, which are appropriated by them. (Code, §§1099-1103.)

For the purpose of promoting immigration \$10,000 is appropriated (Code, §1104). For promoting agriculture, the Virginia State Agricultural Experiment Station at Blacksburg, Virginia, co-operates with the United States Government. And for experimental and demonstration work in the counties, as, corn clubs, etc., the board of supervisors may appropriate county funds, not exceeding \$1,000. (Code, §§868-9, 921-5, 2734.)

§2. Commissioner of Agriculture.—The executive officer of the Board is a Commissioner of Agriculture and Immigration, an elective and salaried officer, who has to assist him four clerks, two stenographers, a State Chemist with four assistants, and a laboratory janitor. The commissioner sees that the orders of the board are carried out, and has immediate direction of all the work of the department. He is to promote improvement of agriculture, look after the interests of the farmer as to fertilizers and compost, seeds, and food products, milk and beef cattle, butter, stock, timber and minerals, and compile a handbook of the advantages of the several counties, to attract capital and immigration. He shall also hold or cause to be held, farmers' institutes in each congressional district. He is to make an annual report to the Governor, which is printed and may be had on application to his office. (Code, §§1104-9.)

The Commissioner and Board of Agriculture are also to provide for the manufacture and distribution at cost to any citizen applying therefor, of serum for the prevention and treatment of hog cholera. (Code, §§1283-6.)

Provision is also made for the commissioner and board, with the State Pathologist at the Virginia Polytechnic In-

stitute, to take necessary steps to prevent the spread of blight to chestnut trees. (Code, §§1287-8.)

The Commissioner of Agriculture is directed to collect a museum of birds, animals, minerals, plants, and woods; and also to ship specimens of natural history out of the State, to be mounted, or for state exhibition. (Code, §1282.)

§3. State Live Stock Sanitary Board.—The Board of control of the experiment station is also the State Live Stock Sanitary Board, whose duty is to protect the domestic animals of the State from all contagious or infectious diseases of a malignant character, and for this purpose he is to establish quarantine lines and sanitary rules and regulations. He appoints a State Veterinarian, who is to carry out the rules and regulations of the board, and, at the command of the board, is to go and examine such diseased domestic animals and report. Also, upon report of a citizen, the board of supervisors of a county may establish temporary quarantine against contagious or infectious diseases among live stock, and report to the experiment station. (Code, §§906-20.)

Under the direction of the Live Stock Sanitary Board and the State Dairy and Food Commissioner, the State Veterinarian and the veterinarian of the Virginia Experiment Station shall, from time to time, make examination and test dairy cattle for the purpose of controlling tuberculosis among the dairy cattle of the State. (Code, §§920, 1224.)

The State accepts the rules and regulations prepared by the United States Commissioner of Agriculture, under act of Congress for the establishment of a bureau of animal industry for the suppression of contagious diseases among domestic animals, and co-operate with the United States authorities enforcing the said act. (Code, §1289.)

§4. Federal co-operation.—See Code, §§869, 922-5.

§5. Teaching agriculture.—Besides the farmers institutes the law (Code, §§1108, 537), provides for at least one-fourth of the school time be given to instruction in agriculture, domestic arts, sciences, and manual training, in at least one public high school, to be selected by the State Board of Education, in each congressional district, and for this purpose not less than five acres of land is to be leased, purchased

or donated, with suitable buildings and other equipments. (Code, §§713-18.)

§6. Analysis of soil and minerals.—The State Chemist will analyze free of charge specimens of soil sent him, and recommend what fertilizers it needs for the different crops. (Code, §1280.)

The State Board of Agriculture will have assayed or analyzed minerals sent them. (Code, §1281.)

§7. Miscellaneous provisions.—(1) *Inspection and analysis of commercial fertilizers.*—See Code, §§110-31, and Acts 1920, 107, amending §§1110-13, 1119, and repealing §§1116, 1126-31.

(2) *Inspection and analysis of agricultural lime.*—See Code, §§1132-7, and Acts 1920, p. 241, amending §1134.

(3) *Inspection and analysis of agricultural seed.*—See Code, §§1138-54, and Acts 1922 (for inspection of seed Irish and sweet potatoes.)

(4) *Inspection and analysis of stock and poultry food.*—See Code, §§1229-49, and Acts 1922, amending §1245-8.

(5) *Sale of farm products.*—See Code, §§1250-65, and Acts 1920, p. 531, amending §§1257-8, 1260-1, 1264-5.

See, also, *Farmer's "Co-operative Marketing Act."*

(6) *Lime grinding.*—See Code, §§1266-71.

(7) *Veterinary medicine and surgery.*—See Code, §§1272-9.

(8) *Warehouse receipts.*—See *Warehouse Receipts.*

(9) *Inspection and other matters concerning tobacco.*—See Code, §§1348-99, and Acts 1920, p. 591, amending, §§1362-5.

(10) *Inspection of flour and other commodities.*—See Code, §§1400-43.

(1) *Timber lands.*—See Code, §§1444-54.

(12.) *Labels and trade marks.*—See Code, §§1455-63, and *Trade-Marks.*

(13) *Weights and measures.*—See Code, §§1464-85, and Acts 1920, pp. 591 and 244, amending §§1365 and 1471, respectively; see, also *Weights and Measures.*

(14) *Truck experiment stations.*—See Acts 1920, p. 390.

(15) *Sale of indifferent and worthless vegetable seed prohibited.*—See Acts 1922.

(16) *Crop-pests,*—See *State Officers and Boards.*

ALIEN

- §1. Who is an alien
- §2. Rights of an alien

§1. Who is an alien?—An alien is one born outside the jurisdiction of the United States, and whose father, at the time of his birth, was not a citizen of the United States, and who has not been naturalized. (U. S. Constitution, 14th Amend., §1; U. S. Rev. Stat., §§1922, 1993; Code §62.) See *Citizen*.

§2. Rights of an alien.—He has not political rights, so he cannot vote, hold office, or serve as juror. An alien, who is not an enemy, i. e., one whose country is at peace with this country, is for the most part, entitled to the same rights and privileges as a citizen. He may contract and be contracted with, sue and be sued, acquire and transfer property; and as to real estate the statute changes the common law by providing that, "Any alien, not an enemy, may acquire by purchase or descent, and hold real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens". (Code, §66.) And it makes no difference that any ancestor of his through whom he receives an estate by descent, is or has been an alien. (Code, §5267.) But an alien, though naturalized, cannot be President of the United States, for he must be a "natural born citizen". (U. S. Const., art. 2, §1.) An alien enemy, of course, has none of the rights or privileges of alien friends; yet the humanity of modern times will protect his person and property until he can get out of the country, (U. S. Rev. Stat., §§4067-70.)

ALIMONY

- §1. Definition
- §2. Temporary alimony
- §3. Permanent alimony

§1. Definition.—Alimony is the allowance made by court to a wife from her husband's estate or income, for her maintenance, or support.

§2. Temporary alimony.—Alimony pendente lite, or temporary alimony, is the allowance which the court, or judge in vacation, may make at any time pending a suit for divorce, for the maintenance of the wife and to enable her to carry on the suit. (Code, §5107.) Such alimony is granted almost as a matter of course, unless the wife has ample means of her own. But the trial court cannot compel the husband to pay such alimony pending an appeal from a decree allowing the alimony. The amount of such alimony is determined by all the circumstances of the case, and is usually about one-fifth of their joint income. (See some Virginia digest.)

§3. Permanent alimony.—Permanent alimony is the sum ordered to be paid by the husband to the wife periodically during their joint lives or their separation; or such part of the real and personal estate of the husband as the court, upon decreeing a dissolution of a marriage or upon decreeing a divorce, may see fit to allow her. Upon such decree, the court may also decree as to the care, custody, and support of the minor children, which decree the court may afterwards alter as the circumstances of the parents and the benefit of the children may require. (Code, §5111.) Alimony may also be allowed, in Virginia, in a suit brought for that special purpose, where the misconduct of the husband drives the wife from her home or he turns her out of doors. But no alimony will be decreed to a wife who, without adequate reason, deserts her husband and refuses to live with him; nor is it an adequate excuse for such desertion, that he is rude and dictatorial in his speech, exacting in his demands upon her, penurious and close, and sometimes unkind and negligent in his treatment of her.

The amount of permanent alimony is in the sound discretion of the court, upon view of all circumstances of the case. The wife is given a support corresponding to her husband's condition in life, and his wealth and resources, including his and her earnings, or ability to earn money. The amount is usually fixed from one-half to one-third—often-times two-fifths of their joint income. (See some Virginia digest.)

ALTERATION OF WRITINGS

§1. Immaterial alterations

§2. Material alterations

§1. Immaterial alterations.—Not every alteration of a writing is material and fatal. Some are immaterial, and do not avoid the writing. They are immaterial if they do not change the legal effect of the writing; as, altering, inserting, or erasing words without changing the legal sense or effect. (2 M's. Real Prop., §§1191-2.)

§2. Material alterations.—A material alteration is one that changes the legal effect of the writing, and so makes it void. In order to constitute a material alteration in a writing, the change must be made, (1) after it is executed; (2) intentionally; (3) by one having an interest in it; and (4) without the consent of the party bound by it. If an alteration possesses all of these requisites, a recovery cannot be had upon either the altered or the original writing; and there is no distinction between sealed and unsealed instruments in this respect. Thus: the alteration of a bond making it bear a higher rate of interest; changing the amount of an endorsed note; making a note negotiable; altering it so as destroy or change its negotiability; changing the date of a note or other security, the time of payment, the place of payment, or amount to be paid (either by lessening or increasing the principal); by changing the rate of interest or adding a provision for interest; by adding to or withdrawing from an instrument the name of a maker or drawer; or changing the name of the payee of an incomplete negotiable note. As to a negotiable instrument, the law expressly provides "that any alteration which changes: (1) the date; (2) the sum payable, either for principal or interest; (3) the time or place of payment; (4) the members or relations of the parties; (5) the medium or currency in which payment is to be made, or which adds a place of payment where no place of payment is specified, or any change or addition which alters the effect of the instrument in any respect, is a material alteration". The law further provides that, "where a negotiable instrument is materially altered without the assent of all parties liable there-

on, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent endorser"; but if the altered instrument "is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor". (Code, §§5686-7.) If the alteration of a writing is made by one not a party to the contract; or was not made intentionally, but by accident or mistake; or if made with the consent of the party claiming a discharge; or if it is afterwards ratified by the party, the writing is not void. Even though the alteration was without fraudulent intent and innocently made, yet if it was done intentionally, the writing is void; but a recovery may be had on the original consideration for the writing. An innocent alteration may be erased before transfer. If the alteration is fraudulent, it is forgery. See *Forgery*.

The alteration of a deed of conveyance, deed of trust, lease, or bill of sale, has no effect on the validity thereof as originally written, except that unperformed covenants or agreements therein are void; but the burden is upon the party claiming under it to show what the original contents were. (2 M's. Real Prop., §§1191-2.)

§3. Burden of proof as to alteration.—The burden is upon the party offering in evidence a writing, sealed or unsealed (including receipts), to explain any appearance of alteration on its face; either by the alteration having been noted as made before signing, or other positive evidence to the same effect, or by the handwriting and ink being the same with the body of the instrument. Every such alteration detracts from its credit and renders it suspicious, and this suspicion the party claiming under it is ordinarily held bound to remove. But where a party demands the production of a written contract mentioned by a witness, the other party, who does not claim under it, does not have to explain any appearance of alteration on its face. So where an alteration of a writing is made before execution, that fact should be noted at the end of the writing either before the signatures, or if it is witnessed, above the place where the witnesses are to sign, or, if it is acknowledged, in the acknowledgement, as "acknowledge the same with all the alterations and interlineations therein." (2 M's. Real Prop., §§1191-2.)

§4. Filling up blanks.—As to negotiable instruments, the law provides that where an instrument “is wanting in any material particular, the person in possession has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper, delivered by the person making the signature in order that the paper may be converted into a negotiable instrument, operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with authority given and within a reasonable time”. But “where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery”. “Where an instrument expressed to be payable at a fixed period after date, or where the acceptance of an instrument payable at a fixed period after sight, is undated, any holder may insert therein the true date of issue or acceptance, and interest shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him, the date so inserted is to be regarded as the true date”. (Code, §§5575-7.) As to bonds and deeds, blanks therein cannot be filled with material matter unless authorized by writing under seal, or filled in the presence of the obligor or grantor by his direction. Where a bond complete on its face, yet executed on condition that other sureties sign it before its delivery, is delivered to the obligee, who was not informed of the condition, the bond is binding on the sureties. Filling in the date of a deed is not material. (2 M’s. Real Prop., §1192.)

ANIMALS, FOWLS, ETC.

See *Dogs*

- §1. Ownership of offspring
- §2. Hire and use
- §3. Feeding or pasturing animals
- §4. Breeding of animals
- §5. Diseases of animals
- §6. Dead animals
- §7. Estrays. See *Finding Property*
- §8. Animals running at large
- §9. Injuries by animals
 - (1) Vicious animals
 - (2) Trespassing animals
- §10. Injuries to animals
 - (1) Injuries generally
 - (2) Injuries by railroad company
 - (3) Injuries to animals in shipment. See *Common Carrier*
- §11. Cruelty to animals
 - (1) Cruelty to animals generally
 - (2) Fighting animals
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- §12. Offenses as to animals
 - (1) Stealing certain animals
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 - (3) Poisoning, killing, maiming, or disfiguring animals or fowls
 - (4) Driving, etc., animals on railroad track
 - (5) Buggery or bestiality. See *Buggery*
 - (6) Leading or driving a bear along a street or road
 - (7) Horse racing on road or bridge or betting thereon
 - (8) Driving sheep along the road ten miles without branding them
 - (9) Dead animals

§1. Ownership of offspring.— The general rule is the offspring or increase of an animal belongs to the owner of the mother, in pursuance of the maxim “the offspring follows the dam”; but if she have offspring while hired to a person for a given period, it belongs to such person; in case of a loan simply, it belongs to the owner. Where the mother is sold with a reservation of title or lien, the offspring born before full payment belongs to the seller until the purchase price is paid. Where a deed of trust is given on the mother, there is also a lien on the offspring, born after its execution, until the

debt is paid, even though the deed of trust does not mention the offspring; but as against a bona fide purchaser without notice, or an attaching creditor, the lien does not last longer than when the offspring is or should be weaned, unless, of course, the lien on the offspring is provided for in the deed of trust. This lien, if given before the docketing of the lien for the get of the offspring, has priority over it. See *Liens of Mechanics and Others*, section 24. Persons owning live stock for life or during widowhood or for other limited time, are entitled to the increase during that time. (See general common law authorities.)

§2. Hire and use.—A person hiring out an animal impliedly warrants that the same is reasonably fit and suitable for the work intended. He is also bound to make known any vicious habits of the animal. On the other hand, the party hiring an animal must exercise ordinary diligence and care in the use of the same,—extraordinary diligence, if the animal is loaned to him without compensation. (See general common law authorities.)

Besides a civil action for damages, it is a misdemeanor punishable by a fine from \$10 to \$50, for a person who has hired a horse, mule, or vehicle, wilfully or negligently to injure or damage the same, or to permit any other person to do so, by hard or reckless riding, driving or using, or to hire the same to any other person, or to procure a horse, mule or vehicle from a licensed livery stable keeper without previously making arrangements for credit and use the same without paying therefor, with intent to cheat or defraud him. (Code, §4567.)

§3. Feeding or pasturing animals.—See *Liens of Mechanics and Others*, sections 21 and 23.

§4. Breeding of animals.—It is a misdemeanor punishable by fine not over \$500 or jail not over 12 months, or both, to obtain by false pretense the registration of cattle or other domestic animals, or knowingly to give a false pedigree thereof. (Code, §4460.)

For lien for the get of a colt or calf, see *Liens of Mechanics and Others*, section 24.

§5. Diseases of animals.—See State Live Stock Sanitary Board. Code, §§906-20.

§6. Dead animals.—The following act, it should be observed, does not apply to any county until the board of supervisors adopts the same:

"The owner of any animal or grown fowl, which has died, knowing of such death, shall forthwith cremate or cause to be cremated, or bury or cause to be buried, the body of such animal or grown fowl, and if he fails to do so any justice, after notice to the owner, if he can be ascertained, shall cause any such dead animal or fowl to be cremated or buried by a constable, or other person designated for the purpose, and the constable or other person shall be entitled to recover of the owner of every such animal so cremated or buried, a fee of five dollars, and of the owner of every such fowl so cremated or buried a fee of one dollar, to be recovered in the same manner as officers' fees are recovered, free from all exemptions in favor of such owner. Any person violating the provisions of this section shall be subject to a fine not exceeding twenty dollars for each offense. This section shall not apply to any county until the board of supervisors thereof shall adopt the same." (Code, §1554, as amended by Acts 198, p. 446.)

"If any person cast any dead animal into a road, or having in custody any maimed, diseased, disabled or infirm animal, leaves it to lie or be in a street, road or public place, he shall be fined not exceeding \$20." (Code, § 4743.)

§7. Estrays.—See *Finding Property*.

§8. Animals running at large.—The Constitution forbids the legislature to pass any local, special, or private law as to the running at large of stock. (Const., §63 (16).)

An incorporated town may regulate or forbid the running at large of cattle or other domestic animals within its corporate limits (Code, §3538). For trespassing by animals, see section 9, (2), below.

A board of supervisors of a county also has power "to prevent trespassing by persons, animals, and fowls" (Code, §2743).

We also have a law which may be adopted for the protection of villages and unincorporated communities, having within certain defined boundaries a population of 300 or more, against the running at large of horses, mules, ponies, asses, cattle, hogs, sheep, and goats within said boundaries. The

circuit court upon the petition of twenty or more of the freeholders, and after 10 days' notice posted at the front door of the court house, and at three or more conspicuous places within said boundaries, may fix the said boundaries as the limit within which the said animals shall not run at large. If the petition is sworn to and there is no defense, the order is entered without further evidence; but any person may contest the said petition, and if upon the evidence, and, if in doubt, upon the report of one or more persons appointed to canvass the community, the court, if it appears that there are as many as 300 persons within the said boundaries and that a majority of the freeholders residing therein are in favor of prohibiting such animals from running at large, enters an order accordingly, which order becomes operative within 10 days thereafter, and any person, after that time permitting an animal to run at large is fined from \$2 to \$5 for each day, and the animal may be impounded by any person until the expense of keeping same is paid. (Code, §§3550-1.)

"If any person wilfully or negligently permit any unaltered horse or jack of the age of two years or more, or any bull of the age of one year or more, to go at large out of the enclosed grounds of the owner or keeper, or take such horse or jack to any place of public worship, after being admonished by any person not to do so, he shall forfeit \$10 for the first offense, and for the second offense double that amount, to be recovered before a justice, and for the third offense said horse, jack or bull shall be the property of any person who will take him up: provided, that the provisions of this act, as to bulls, shall not apply to any county until adopted by a majority vote of the board of supervisors of such county." (Code, 4744.) For trespass by animals, see section 9, (2), below.

§9. Injuries by animals.—(1) *Vicious animals.*—A vicious animal may be killed in the necessary defense of one's self, family, or property. Such animal must be kept properly secured, otherwise the owner, if he knows of his vicious disposition, is liable in damages to any one injured by him; and the same is true of a ferocious wild animal, escaping from his keeper. As to mad or sheep killing dogs, the law provides that, "Any justice, on proof that any dog is mad or has been bitten by a mad dog, or has killed or worried any sheep, shall

order such dog to be killed. If the owner of any dog so ordered to be killed, conceal him, or cause him to be concealed, to prevent the order from being executed, he shall be fined \$4 for each day such dog shall be so concealed". (Code, §§1551-2.) A board of supervisors or city council may provide help for a poor person bitten by a mad dog. (Code, §1553.) See *Dogs*. The owner is liable for injuries done by animals running at large contrary to law, even though they are not vicious.

(2) *Trespassing animals*.—The law provides that if any "horses, mules, cattle, hogs, sheep, or goats" shall trespass upon any lands enclosed by a "lawful fence," the owner or manager of such animal shall be liable for the actual damages sustained, not less than \$1 (\$2, if within three miles of Richmond), and where damages are given by way of punishment of the party, they shall not exceed \$20. Double damages, not less than \$2, is allowed for every succeeding trespass. The landlord or tenant, upon getting judgment, has a lien on the animal, and the same may be sold by the officer under an execution, regardless of the "poor debtor's law." Or, the landowner or the tenant may take and impound the animal until the damages are paid or the animal is taken by the officer under the execution, the cost whereof to be estimated as a part of the actual damage. A warrant should be applied for within 3 days after taking up the animal (unless the damages are paid), and is made returnable not less than 3 days from date. (Code, §§3541, 6563.) For what is a "lawful fence", see *Fences*. Non-residents are liable in damages for trespassing in Grayson, Lee, or Scott County by horses, mules, cattle, hogs, or sheep. (Code, §§3542-6.)

As to animals against which the law does not require one to fence, as, chickens, fowls, and other animals, the common law rule prevails in Virginia, viz., that every man is bound at his peril to keep his animals within his own enclosure, and if he does not, he is liable in damages if they go upon the property of others and do injury, as, where a chicken scratches up another's garden, a dog goes into another's hennery and sucks his eggs, and the like injuries; and the party injured has no right to wring the chicken's neck and throw it over the garden fence, or to poison or shoot the dog. His remedy is a warrant for damages; but if the depredation becomes an un-

bearable grievance, his suffering neighbor may kill the trespassing animal and pay for the same, less the amount of damages done him. Of course, if the dog or chicken by his or her conduct becomes a private nuisance, the same may be abated by powder and lead, or otherwise, according to the fancy or taste of the abater. Or if a dog is caught in the act of injuring or destroying fowls or other property, the owner of such property may without liability kill him, if it be apparently necessary to do so to defend or protect his property; or the same may be killed, and paid for out of the Dog license fund. (Acts 1918, p. 622, Pollards Code Biennial 1920, p. 601, §(5).) If the dog is not listed for taxation, it is perhaps no criminal offense to steal or kill him, except where the dog resides in the cities of Richmond, Petersburg, Alexandria, or in the county of Henrico (Code, §§2324, 445)—see section 12, below. A trespassing animal may be caught and impounded, and fed, watered, and cared for to wait future developments; and if the aggrieved party's native ingenuity does not dictate what further course to pursue, he might give the poor depredating dog or hen his or her liberty; or else he should engage at once the services of a lawyer well versed in the intricacies of the common law, otherwise the impounder himself may get impounded in the mists and mazes of inextricable confusion! The law is not clear as to who is entitled to the eggs during the period of impoundment; but as the impounder has a lien on her, and has to water and feed her, it looks like he should (though this is questionable) at least have the eggs for his trouble, as he is not likely to get much else, leastwise he might take them as part payment and look to the owner for the rest!

§10. Injuries to animals.—(1) *Injuries generally.*—The owner of an animal may recover damages against any one who, either intentionally or negligently, injures or kills the same. By section 3350 of the Code, written reports to land-owners are required of animals or fowls caught in a trap.

(2) *Injuries by railroad company.*—A railroad company is liable in damages for killing or injuring horses, cattle, or other stock on its right of way or track which is not enclosed with fences and cattle guards according to law, and no negligence need be proved; but even if the track is enclosed,

the company will be liable, if the animal was thereon by its express permission, or through the negligence of its employees, agents, or servants, or if the injury is wilful, or the result of gross negligence on part of the company, its servants, agents, or employees. (Code, §§3446-9.)

Where an animal is killed or injured, the owner or the company may appoint a disinterested freeholder as the appraiser in his behalf, notifying the other party (and a notice to the nearest section foreman or station agent is sufficient) to appoint a like appraiser in his behalf, and the others to select a third, and the three after being duly sworn constitute a board of appraisers to examine and appraise the animal injured or killed and to fix the damages, carefully describing the same; and they are required to return their report to the clerk's office of the county or city. If the company fails for 60 days after the return of the report to pay the owner the amount assessed and the cost of the appraisement (\$3 to the appraisers and 50 cents to the clerk), the owner may sue the company for the damages. If the owner recovers as much as the amount assessed, he is entitled to 10 per cent. damages in addition; if he recovers less, and the company had offered to pay him the amount assessed, the cost of the appraisement and suit shall be taxed against him. But the foregoing law as to appraisement, does not apply where the company has its road-bed enclosed with fences and cattle guards as required by law. (Code, §§3994-7.) See *Railroads and Railroad Companies*.

(3) *Injuries to animals in shipment*.—See *Common Carrier*.

§11. Cruelty to animals.—(1) *Cruelty to animals generally*.—We have quite a comprehensive act (Code, §§4554-65) as to cruelty to animals, and the rights, duties and powers of societies for the prevention of cruelty to animals. The act is as follows:

“Any person who overrides, overdrives, overloads, tortures, ill-treats, or cruelly or unnecessarily beats, maims, mutilates, or kills any animal, whether belonging to himself or another, or deprives any animal of necessary sustenance, food, or drink, or causes any of the above things, or being the owner of such animal permits such acts to be done by another, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal; or who shall carry

or cause to be carried in or upon any vehicle or vessel or otherwise any animal in a cruel, brutal, or inhuman manner, so as to produce torture or unnecessary suffering, shall be deemed guilty of a misdemeanor punishable by a fine not over \$500 or jail not over 12 months, or both. (Code, §4782); but nothing in this section shall be construed to prohibit the dehorning of cattle."

The act also provides that any officer or agent of such society, whose appointment has been approved by the mayor of a city or town or a judge of a county, may arrest without warrants any person found guilty of any such cruelty in his presence and take the person before a court or magistrate and there make complaint against him; and he has power to execute such warrant, the same as a warrant for an offense not committed in his presence. Such officer or agent shall have a certificate of his appointment from his society, which must be endorsed by the mayor or judge, and this certificate they must show upon request when acting officially.

Such officer or agent may also interfere to prevent any act of cruelty in his presence, and any person interfering with or obstructing or resisting him in the discharge of any of his rights, powers, and duties as prescribed in the act, may be fined not over \$50 or jailed not over 30 days, or both.

Upon complaint on oath to a justice or other proper authority by such officer or agent that he believes and has reasonable cause to believe that the act as to cruelty to animals has been, is being, or is about to be violated in any particular building or place, such justice or officer, if satisfied that there is reasonable cause for such belief, issues a search warrant to any sheriff or sergeant, or his deputy, or constable, police officer, or the officer or agent of such society, the search to be made in the day time, unless otherwise specially authorized.

An officer or agent of such society may destroy or cause to be destroyed any animal in his charge or found abandoned or not properly cared for, when in his judgment and that of two reputable citizens called to view the same in his presence (one selected by the owner if he requests), such animal appears to be injured, disabled, diseased past recovery, or unfit for any useful purpose; and should the two citizens disagree they select a third, whose decision is final. The viewers must give a written certificate of their judgment.

If the person arrested is in charge of any vehicle, such officer or agent may take charge of the animal, vehicle, and its contents also, until the owner takes charge of the same, which he must do within 30 days from notice of the capture, he being notified, if known. The society has a lien on the animal and vehicle for the expenses of caring and providing for them. Such officer or agent may also take charge of any animal abandoned, neglected, or cruelly treated or unfit for use, giving notice to the owner thereof, if known, and he may provide for such animal until the owner takes charge of the same. The expenses of such care and provision may be collected by the society against the owner by suit. Such officer or agent may detain any animal or vehicle taken in charge by him until the expense of food, shelter, and care is paid, and he has a lien upon such animal or vehicle for the same. If such expense be not paid within 30 days after the capture, such animal or vehicle may be sold at public auction, after 6 days' written notice to the owner, if known, of the time and place of sale; if not known, the said notice must be published in some newspaper in the county or city. After paying off the lien, any residue of the proceeds of sale is paid to the owner.

Where the prosecution is upon the evidence, complaint, or information of an officer or agent of such society, one-half of the fine is to be paid to the society, provided the name of the officer or agent is endorsed on the warrant or indictment. But such officer or agent is not entitled to any fees for his services, as against the county, city, town, or state; and the approval of their appointment must be at the expense of the society.

(2) *Fighting animals*.—Fighting cocks, dogs, or other animals for money, prize, championship, or other thing of value, or upon the result of which people bet, or to which an admission fee is charged, is punishable by a fine of \$100 to \$500. (Code, §4550.) And such fight between a man and a bull or any other animal, is a felony, punishable by penitentiary from 1 to 5 years; and aiders and abettors are punishable by penitentiary not over 3 years, or fine not over \$500, or both. (Code, §§4426-7.)

(3) *Horse racing*.—See Code, §§4682-3.

(4) *Shooting pigeons, fowls, etc., for amusement*.—It is

unlawful to keep or use a live pigeon, fowl, or other bird for a target, or to be shot at, either for amusement or as a test of skill in markmanship, or to shoot at a bird kept or used for said purposes, or to be a party to such shooting, or to rent any building, room, field or premises, or to knowingly permit the use thereof for the purpose of such shooting. The punishment is a fine of not over \$50, or jail not over 30 days, or both. This law does not apply to wild game. (Code, §4446.)

§12. Offenses as to animals. (1) *Stealing certain animals.*—Stealing a horse, mule, or ass is punishable by penitentiary from 3 to 8 years; and stealing a cow, steer, bull, or calf, is punishable by penitentiary from 1 to 5 years, or jail not over 12 months and fine of not over \$500. (Code, §4440.)

(2) *Stealing, injuring, or killing dogs.*—Dogs in Richmond, Petersburg, Alexandria, and in the county of Henrico, and all dogs listed for taxation in any county or city are deemed personal property; and stealing any such dog is the same as stealing other property, and if he be hurt or injured, it is an unlawful or malicious trespass. (Code, §§2324, 4445.) See, also, *Dogs*, section 12.

Unlawfully and maliciously to shoot, stab, cut, or otherwise wound or poison another's dog which has been listed or assessed for taxation, with intent to maim, disfigure, disable, or kill the same, is punishable by a fine of not over \$500 or jail not over 12 months, or both (Code, §§4467, 4782); unlawfully to do so or maliciously to injure a dog in Richmond, Petersburg, Alexandria, and Henrico county is punishable by a fine of \$5 to \$500. (Code, §§2324, 4445, 4479.) See *Dogs*.

(3) *Poisoning, killing, maiming, or disfiguring animals or fowls.*—Maliciously poisoning or attempting to poison any horse, cattle, or other beast, or poisoning or killing the same for the purpose of defrauding any insurer thereof, or maliciously shooting, stabbing, or wounding any horse, mule, or cattle with intent to kill or destroy the same, is punishable by penitentiary from 2 to 10 years; unlawfully shooting, stabbing cutting, or wounding any horse, mule, or cattle, or unlawfully and maliciously shooting, stabbing, cutting, or otherwise wounding or poisoning another's fowl, or another's dog which has been listed or assessed for taxation, with intent to maim, disfigure, disable, or kill the same is punishable by penitentiary

from one to three years, or jail not over 12 months and fine not over \$100. (Code, §4467.)

(4) *Driving, etc., animals on railroad track.*—To wilfully ride, drive, or lead or otherwise contrive for any animal to go on a railroad track, without consent of the company, within 100 yards of an approaching train, except in passing over the track at a public or private crossing, is punishable by a fine of \$10 to \$100, and if the same is done at any point on the track with a view to the recovery of damages against the company, and such animal is killed or injured, the punishment is penitentiary from 1 to 10 years, or jail not over 1 year and fine not over \$5,000. (Code, §§4469, 4475.)

(5) *Buggery or bestiality.*—See *Buggery*.

(6) *Leading or driving a bear along a street or road.*—If done by a person not accompanying a menagerie or circus, it is punishable by a fine of \$5 to \$20. (Code, §4737.)

(7) *Horse racing on road or bridge or betting thereon.*—This is punishable by a fine of not over \$100. (Code, §4741.)

(8) *Driving sheep along the road ten miles without branding them.*—This is punishable by a fine of \$5, each ten mile being a separate offense. (Code, §4742.)

(9) *Dead Animals.*—See section 6, above.

ANNUITY

An annuity, strictly speaking, is a yearly payment of a certain sum of money for a certain term; when the payment is made a charge on land it is properly a rent-charge, though oftentimes called an annuity in Virginia decisions. An annuity may be created by a written contract, deed, or will; when by will, it is a legacy. It must be given for a valuable consideration. When an annuity comes to an end by death or otherwise, the amount due is apportioned pro rata, according to the time it runs, unless otherwise provided. (Code, §§5544-6.) For how the present value of annuity is estimated, with table, see *Dower*, section 6.

APPLICATION OF PAYMENTS

- §1. By the debtor
- §2. By the creditor
- §3. By the law

§1. By the debtor.—Where a part payment is voluntarily made by a debtor on more than one account, the debtor may direct the application of the payment, at or before (but not after) the time he makes it, even to the principal to the exclusion of due interest. This direction may be implied as well as expressed. A general payment will be presumed, in the absence of any contrary indication, to be intended to be applied to a due debt rather than to one not due. The source whence the fund was derived will also direct the application, in the absence of a different direction. (3 Min. Inst. 398-9.)

§2. By the creditor.—Where the debtor, at or before the time of payment, gives no direction, the creditor may then or any time afterwards, before controversy or suit, make the application; but having once made it, he cannot change it. Neither can he make the application on an invalid debt, as a usurious interest, though it seems he may apply it to a debt barred by the statute of limitations, or to one required to be in writing but is not. The creditor's application may, like the debtor's, be implied; as, where he enters the debits and credits in a general account as they occur. This, in the absence of evidence to the contrary, is considered an application of the credits to the debits in order of time, thus paying the debt first due. (3 Min. Inst. 399.)

§3. By the law.—If neither party apply the payment, the law will make the application in such a manner as, under the circumstances is reasonable and just. (3 Min. Inst. 399-400.) See, also, *Interest and Usury*, section 14.

ANTI-TRUST LAW

(Acts 1919, p. 82—"An act to prevent trusts, combinations, and monopolies inimical to public welfare"; Pocket

Code, §4722a; Pollard's Code Biennial 1920, p. 697; Va. Const., §165.)

See Forestalling, Regrating, and Engrossing

- §1. Definition of "person," "trust or monopoly "
- §2. Unlawful to issue or own trust certificates or to manipulate price or production; contracts void
- §3. Foreign corporations violating this act forbidden to do business here
- §4. When unlawful to lease or sell for resale, or to fix price of commodities, or to discount or rebate price
- §5. Damages to person injured by violation of this act
- §6. When judgments or decrees prima facie evidence in other suits; when running of statute of limitation suspended
- §7. Penalty for violation of act
- §8. Act not applicable to labor, agricultural, or horticultural organizations
- §9. How warrants issued and where returnable; indictments to be found
- §10. When proceedings in equity may be instituted, injunctions granted, etc.
- §11. When Attorney-General may sue out injunction in circuit court of Richmond
- §12. How indictments tried
- §13. When indictment sufficient
- §14. What proof of trust, etc., sufficient; witnesses compellable to give incriminating evidence, but exempted from prosecution
- §15. When bond required of suspected offenders; proceedings on forfeited bonds
- §16. Part of act declared unconstitutional not to affect rest of act
- §17. Act to be liberally construed

§ 1. Definition of "person," "trust or monopoly."—The word "person" or "persons," as used in this act, includes corporations, partnerships and associations existing under or authorized by any State or territory of the United States or a foreign country.

A trust or monopoly is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, for any or all of the following purposes:

- (a) To create or carry out restrictions in trade or business.

(b) To limit or reduce the production or increase of merchandise or commodities.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or commodities.

(d) To fix at a standard or figure, whereby its price to the public, or consumer is in any manner controlled or established, any article, thing, or commodity of merchandise, produce, business or commerce intended for sale, barter, use, enjoyment or consumption in this State.

(e) To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description by which they bind or have bound themselves not to sell, dispose of or transport any article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected. Such trust, or monopoly, as is defined herein is unlawful, against public policy and void. (Acts 1919, p. 82, §1.)

§2. Unlawful to issue or own trust certificates or to manipulate price or production; contracts void.— It shall be unlawful for a person, partnership, association or corporation, or any agent, to issue or own trust certificates, or for a person, partnership, association or corporation, or any agent, officer or employee thereof, or a director or stockholder of a corporation, to enter into a combination, contract or agreement with any person or persons, corporation or corporations, or a stockholder or director thereof, the purpose and effect of which is to place the management or control of such combination or combinations or the manufactured product

thereof, in the hands of a trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of an article of commerce, use, enjoyment or consumption, or to prevent, restrict or diminish the manufacture or output of such article. A contract or agreement in violation of any provision of this act is void and not enforceable either at law or in equity. (Id., §2.)

§3. Foreign corporations violating this act forbidden to do business here.—A foreign corporation or foreign association exercising any of the powers, franchises or functions of a corporation in this State violating any provision of this act shall not have the right of and shall be prohibited from doing any business in this State. (Id., §3.)

§4. When unlawful to lease or sell for resale, or to fix price of commodities, or to discount or rebate price.—It shall be unlawful for any person engaged in business within this State, in the course of such business, to lease or make sale, or contract for sale, of goods, wares, merchandise, machinery, supplies, or other commodities for use, consumption or resale within this State, or to fix the price therefor, or discount from, or rebate upon such prices on the agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares or merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for sale of such goods, wares or merchandise may be to substantially lessen competition, or to create a monopoly in any line of business, but nothing contained in this act shall apply to discrimination in prices between purchasers of commodities on account of differences in grade, quality, or quantity (provided such differences shall be reasonable) of the commodity sold, or only to make allowance for differences in the cost of transportation or to discriminate in price in the sale of different commodities made in good faith to meet competition; nor shall it prevent persons selling goods as merchandise from selecting their own customers in bona fide transactions and not in restraint of trade. (Id., §4.)

§5. Damages to person injured by violation of this act.—Any person who shall be injured in his business or property by reason of anything forbidden in this act may sue therefor and

recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and said counsel shall in no case receive any other, further or additional compensation except that allowed by the court, and any contract to the contrary shall be null and void. (Id., §5.)

§6. When judgments or decrees prima facie evidence in other suits; when running of statute of limitation suspended.—A final judgment or decree rendered in any criminal prosecution or proceeding in equity brought in behalf of the Commonwealth under this act to the effect that the defendant has violated the provisions of this act shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under this act, as to the matters respecting which said judgment or decree would be an estoppel as between the parties thereto; but this section shall not apply to judgments or decrees entered before any testimony has been taken or to judgments or decrees rendered by consent in criminal proceedings. Whenever any suit or proceeding in equity or criminal prosecution is instituted by the Commonwealth to prevent, restrain or punish any of the violations of this act, the running of the statute of limitations in respect of any suit or action arising under this act and based in whole or in part on any matter complained of in said suit or proceeding, shall be suspended during the pendency thereof. (Id., §6.)

§7. Penalty for violation of act.—Any person, firm, or any officer or director of any corporation, violating or conspiring to violate any of the provisions of this act shall be fined not exceeding one thousand dollars, or confined in jail not exceeding twelve months, or both. On the second or subsequent conviction, the offense may, in the discretion of the jury, be punishable by a fine of not less than one thousand nor more than five thousand dollars and by confinement in jail not less than six months and not exceeding twelve months, or by confinement in the penitentiary not less than one nor more than ten years. (Id., §7.)

§8. Act not applicable to labor, agricultural or horticultural organizations.—This act shall not be construed to forbid the existence and operation of labor, agricultural or horticultural organizations instituted for the purpose of mutual

help, and not having capital stock or conducted for profit; nor to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations trusts, or monopolies under the provisions of this act. (Id., § 8.)

§9. How warrants issued and where returnable; indictments to be found.—Whenever the attorney for the Commonwealth of any city or county in this State shall have reason to believe that the provisions of this act have been or are being violated, he shall cause a warrant or warrants to be issued by a justice of the peace of his county or city, returnable to the circuit court of his county or corporation court of his city, after which the offender shall be proceeded against by indictment or, in lieu thereof, indictments may be preferred against such offender in the first instance, with the usual right to bail. (Id., §9.)

§10. When proceedings in equity may be instituted, injunctions granted, etc.—Whenever ten or more citizens of any county or city shall file a bill in chancery in the circuit court of any county or the corporation court of any city against any person, firm or corporation, alleging violations of the provisions of this act and praying that said party or parties defendant may be restrained and enjoined from continuing the acts complained of, such court shall have jurisdiction to hear and determine the issues involved, to issue injunctions pendente lite and permanent injunctions and to decree damages and costs of suits, including reasonable counsel fees to complainants' or defendants' counsel. (Id., §10.)

§11. When Attorney-General may sue out injunction in circuit court of Richmond.—Whenever affidavits of fifty or more citizens of the Commonwealth shall be submitted to the Attorney-General alleging a violation or violations of the provisions of this act upon the part of citizens of two or more counties, or of a city and one or more counties, or whenever the governor shall request such action, it shall be the duty of the Attorney-General to file a bill for an injunction against the alleged violators thereof in the circuit court of the city of Richmond, which shall have jurisdiction to summon the defendants and try the issues involved as though such defendants

were citizens of the city of Richmond, and may issue injunctions pendente lite or permanent injunctions for the purpose of enforcing the provisions of this act. (Id., §11.)

§12. How indictments tried.—The grand juries of the several cities and counties shall have jurisdiction to indict violators of the provisions of this act, who shall be tried in the circuit courts of the counties and the corporation courts of the cities as in the case of appeals from justices of the peace and police justices and in the case of second, or subsequent, offenses the cases shall be tried as other felonies are tried in said courts. (Id., §12.)

§13. When indictment sufficient.—In any indictment, information or complaint for any offense named in this act, it shall be sufficient to state the purpose or effect of the trust, combination or monopoly and that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes, without giving its name or description, or how, when and where it was created. (Id., §13.)

§14. What proof of trust, etc., sufficient; witnesses compellable to give incriminating evidence, but exempted from prosecution.—In prosecutions under this act, it shall be sufficient to prove that a trust, combination or monopoly, as defined herein, exists, and that the defendant belonged to it, and acted for or in connection with it, without proving that all the members belonged to it or without proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. Evidence of the general reputation of the existence and character of the trust or combination alleged shall be admissible. In case any court of record, or in vacation, any judge of said court, in which is pending any civil, criminal or other action or proceeding brought or prosecuted by the Attorney-General or any Commonwealth's attorney for the violation of any of the provisions of this act, or in any action or proceeding for the violation of the provisions of this act, no person so ordered shall be excused from attending, testifying or producing books, papers, schedules, contracts, agreements or any other document in obedience to the subpoena, or under the order of such court or any commissioner or referee appointed by said court to take testimony, or any

notary public or other person or officer authorized by the laws of this State to take depositions, when the order made by such court, or judge thereof, includes a witness whose deposition is being taken before such notary public or other officer on the ground or for the reason that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty; but no individual shall be prosecuted or be subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, before any such court, person or officer; but no person shall be excused from testifying for the Commonwealth or the plaintiff or complainant in any proceeding under this act as to any offense committed by another hereunder by reason of his testimony tending to incriminate himself, but the testimony given by such person, on motion of either the Commonwealth, the plaintiff or complainants, shall in no criminal case be used against him, nor shall he be in anywise prosecuted criminally for any offense as to which he has so testified. (Id., §14.)

§15. When bond required of suspected offenders; proceedings on forfeited bonds.—In any proceeding under this act before any court of competent jurisdiction, if it appears from competent evidence that violations of the provisions of this act were contemplated, but not actually committed, the said courts in which such proceedings as aforesaid are pending, may require a bond or bonds of the defendant or defendants in the penalty of not more than \$1,000, conditioned upon the abstention from all violations of the provisions of this act for the period of one year. In case of the forfeiture of the said penalty of said bond or bonds, like proceedings shall be had thereon as in the case of the forfeiture of recognizance. In the case of disobedience to any injunction or decree, like proceedings shall be had as in the case of other contempts of court. (Id., §15.)

§16. Part of act declared unconstitutional not to affect rest of act.—If any section or provision of this act or any part of any section shall be declared unconstitutional by the supreme court of appeals of Virginia, or the supreme court of the United States, the part so declared unconstitutional shall cease to be operative, but the remainder of the act and every

section or part thereof not so declared unconstitutional shall continue to be the law of this State. (Id., §16.)

§17. Act to be liberally construed.—The provisions of this act shall be liberally construed in order effectually to secure the enforcement of the provisions hereof for the protection of the people of the Commonwealth, but the act shall apply only to those trusts, combinations and monopolies which are unreasonable or inimical to the public welfare, or [as?] hereinbefore defined. (Id., §17.)

APPEALS

(See “Burks’ Pleading and Practice” (new ed.), title *Writ of Error*.)

See Justice of the Peace, and Trials

- §1. Criminal cases
- §2. Civil cases

§1. Criminal cases.—“For Exceptions, Writs of Error, and Execution of Judgment”, in criminal cases, see Code, §§4929-53, and Acts 1920, p. 241, amending §4930.

§2. Civil cases.—For Appeals, Writs of Error, and Supersedeas, in civil cases, see Code, §§6336-72, and Acts 1920, p. 416, repealing §6339, and Acts 1922, amending §§4930, 4869, 6337, 6348, 6355, 6358. Exceptions in civil cases are embraced under *Trial*.

APPORTIONMENT

- §1. Definition
- §2. Compensation for preparing land for crop
- §3. Apportionment of rent where an estate for life or other uncertain interest is ended
- §4. Apportionment of rent, hire, or money coming due at fixed periods
- §5. Where lessor assigns to several

§1. Definition.—Apportionment is the division or distribution of a subject matter into proportionate parts. Below is the law as to the apportionment of rents, and of other money coming due at fixed periods. (4 Min. Inst. 128.)

(1) *Where part of land is used for crop after lease ended.*—Where a lease is ended by the act of God or the law and without the tenant's fault, he, or his executor or administrator, shall pay a reasonable rent for so much of the land as the crops occupy, in the same proportion as that part shall bear in quantity and value to the entire premises; and such rent shall be apportioned among the owners of the land, if there be more than one, according to their respective interests. (Code, §5541.)

§2. Compensation for preparing land for crop.—If any land has been prepared by the tenant previous to the expiration of the lease, for the purpose of putting a crop into the ground, and the lease is ended by the act of God or the law and without the tenant's fault, those who succeed to the land shall pay a reasonable compensation for such preparation. (Code, §5542.)

§3. Apportionment of rent where an estate for life or other uncertain interest is ended.—If there be an estate for life or other uncertain interest in land which is leased to another, upon the end of such estate by death or otherwise, the lessee may hold the land to the end of that year of the lease, and the rent, if to be paid in money, shall be apportioned between the owner of the life estate or other uncertain interest, or his executor or administrator, and those who succeed to the land: if the rent is to be paid in kind, or in a part of the crop, it shall be paid to the former, who shall pay to the latter a reasonable rent, in money, from the end of said estate to the end of the said year; and such payment in money is a charge, in preference of other claims, on the rent received for the part of the crop thus paid. (Code, §5543.)

§4. Apportionment of rent, hire, or money coming due at fixed periods.—On the end by death or otherwise of the lessor's estate for the lease of which rent is to be paid at certain fixed periods, as, where the lessee acquires part of the land by purchase or descent, or where a third party takes a part or all of the land by a superior title or where land or buildings

are wholly or partially destroyed by earthquake, fire, or otherwise, or where the lessor assigns part of the rent to another, or where a part of the land is sold to another; or on the end, by death or otherwise, of a contract of hire, by which money is to be paid at certain fixed periods; or on the end, by death or otherwise, of the estate or other thing, from or in respect to which is derived money coming due at fixed periods, as, an annuity, etc.; or on the death of any persons interested in such rent, hire, or money, the person or his executor or administrator, or his assignee, who would have been entitled, but for such death or other event, to the rent, hire, or money coming due at any such period, shall have a proportion thereof, according to the time which has elapsed, including the day of such death or event, deducting a proportional part of the charges; unless, indeed, where it is expressly provided that no apportionment shall take place. (Code, §§5544-7.)

§5. Where lessor assigns to several.—If the lessor assigns the reversion, or part thereof, in parcels to different persons, the rent thereafter falling due is apportioned among the new owners. (1 M's. Real Prop., §412.)

§6. Where the lessee is evicted.—Where the lessee is evicted or ousted from the premises or part thereof by a third person under a superior title, the rent is proportionately reduced; but if evicted by the lessor himself from any, even the least part, it suspends the entire rent for the whole term, even though the tenant continues in possession of the rest. (1 M's. Real Prop., §412.)

APPRENTICESHIP

§1. Definition

§2. How minors are bound out or placed in charitable institutions

§3. Useful forms under "Apprenticeship"

§1. Definition.—An apprenticeship is a contract by one person, called a master, who understands some art, trade, or business, and undertakes to teach the same to a minor, called

the apprentice, who, on his part, is bound to serve the master in such art, trade, or business, during a definite period of time. in Virginia until 21 years old, if a boy, or 18 years old if a girl (Code, §5301).

§2. How minors are bound out or placed in charitable institutions.— A minor may be bound by his guardian, or, if none by his father, or, if neither, by his mother, in either case with the consent entered of record of the court, if he be under 14 years old. If of that age or older, he may consent thereto himself. In like manner, a minor may be placed in some charitable institution or school for such time as may be agreed upon. And the overseer of the poor, with the consent of the court may bind out or place in such institution, a minor found begging, or who is likely to become chargeable to the county or corporation (Code, §§5998-90.) For other provisions of the law as to masters and apprentices, see sections 5301-13 of the Code. For commitment of minors to charitable societies, Prison Association of Virginia, and the Negro Reformatory Association of Virginia, see *Minors, Infants, or Children*.

§3. Useful forms under "Apprenticeship."

No. 1. WRITING OF APPRENTICESHIP. (Code, § 5305.)

This indenture, witnesseth, that it is mutually agreed between F. M., and M. A., that A. P., aged_____years, shall be taken and held as an apprentice for_____years by the said M. A., and the said M. A. contracts and covenants with the said F. M., faithfully and carefully to instruct the said A. P., in all the handicraft of a_____ (here state the trade or business), and the said M. A., further contracts and covenants that the said A. P. shall be allowed as compensation in consideration of his services, for the first year, at the rate of \$_____ per week (or *per year*); for the second year, at the rate of \$_____ per week (or *per year*); (and so on); and at the expiration of his term of apprenticeship, \$_____. And we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this_____day of_____, 192---

F. M. (L. S.)
M. A. (L. S.)

State of Virginia, _____county, to-wit:

Executed before me, J. T., a notary public (or *justice of the peace*) in and for the county and state aforesaid, this_____day of_____, 192---
J. T., N. P. (or *J. P.*)

No. 2. CONSENT OF MINOR TO BEING BOUND AS AN APPRENTICE
(Code, § 5298.)

"I, A. P., do hereby consent and agree to be bound as an apprentice to M. A., according to the intent and meaning of the foregoing (or within) indenture, and do sign this my consent in pursuance of the statute in such case made and provided, to the said indenture, before the same is executed by any of the parties thereto. This-----day of -----, 192---- A. P." -

No. 3. BOND OF MASTER TO OVERSEER, WHEN THE APPRENTICE IS BOUND BY HIM WITH THE CONSENT OF THE COURT.
(Code, §§ 5299, 5306, 5316.)

Know all men by these presents, that we M. A., and A. B., are held and firmly bound unto E. F., overseer of the poor for-----magisterial district of the county of-----, and his successors, in the just and full sum of-----dollars, the payment whereof well and truly to be made to the said overseer of the poor, we bind ourselves, jointly and severally, firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation.

Witness our hands and seals, this-----day of-----, 192----

Yet upon this condition, that whereas the circuit court of-----county, did, on the-----day of-----, 192---, make the following order: (here recite the order). Now, therefore, if the said M. A. shall well and truly satisfy and pay the several sums of money in the said order mentioned with interest, at the times they shall respectfully fall due, then this obligation to be void; otherwise to remain in full force and and virtue.

M. A. (L. S.)
F. M. (L. S.)

ARBITRATION

See "Burks' Pleading and Practice" (new ed.), title *Arbitration and Award*

- §1. Definitions
- §2. Submission to arbitration
- §3. Arbitration and umpire
- §4. Award, or decision
- §5. Administrator, executor, guardian, etc., may submit to arbitration
- §6. Useful forms under "Arbitration"

§1. Definitions.—Arbitration is the investigation and decision of matters of difference or controversy between contending parties by one or more persons chosen by the parties. The contract between them, by which they agree to submit the matter to arbitration, is called a “submission”; the parties so appointed are called “arbitrators”; while their decision is an “award”. If the arbitrators cannot agree, they appoint a third person, called an “umpire”, who decides the controversy. Arbitration is indeed a most economical and desirable mode of settling one’s controversies. (4 Min. Inst. 170.)

§2. Submission to arbitration.—Arbitration may be either by contract between the parties out of court, or it may be by order of court. It may be either verbally or in writing, but it should of course always be in writing, and must be where the controversy relates to real estate. Sometimes it is in the form of an exchange of bonds between the parties. Our Statute provides that persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement made out of court, or by consent of the parties given in court, in person or by counsel, the agreement is entered in the proceedings of the court; and thereupon a rule, or order, is entered that the party shall submit to the award, or decision, which shall be made in pursuance of such agreement; and such submission cannot be revoked by either party to it, without the leave of court. The court may, from time to time, enlarge the time within which a decision is required to be made. (Code, §§6159-60.) A submission not made in court may be revoked by either party at any time before the decision is rendered, provided notice thereof is given to the arbitrators before they render a decision; but the other party may, in such case, sue him for damages for breach of contract. (4 Min. Inst. 172-5.)

§3. Arbitrators and umpire.—There may be one or more arbitrators, either mutually agreed upon, or each party may select one or more, and the parties either agreeing upon another, as umpire, or stipulating that such umpire shall be chosen by the arbitrators, in which last case the arbitrators must be informed of such appointment and given a reasonable

opportunity to produce their evidence before him, for he must not derive his knowledge of the evidence from the other arbitrators, but must himself rehear the case. It would seem that they should have greater latitude in procedure and the production of evidence (which should be legal evidence) before them than in court, yet, like a magistrate in Virginia, they should decide a case according to the principles of law and equity, and where these conflict, equity (i. e., justice regardless of the stiff rules of law) should prevail. (4 Min. Inst., 175-6.) Summons for witnesses may be issued by the arbitrators or the clerk of the court. (Code, §6217.)

§4. Award, or decision.—The decision must keep within the terms of the submission or agreement, for that is their sole authority for acting; on the other hand, it should decide all that was submitted. It must not propose what is impossible or illegal; it must be reasonable and advantageous, not something idle or useless; and it must be such as wholly and finally ends the controversy. If the submission does not otherwise provide, the award, if not made under an order of court, may be orally or in writing, but by all means it should be in writing, signed by the arbitrators or a majority of them. If the award is made in pursuance of a rule of court, it must be in writing, and must be returned to the court in order that it may be entered on the records of its proceedings. Even if the award or decision is made under an agreement out of court, the statute provides that it may, like an award made under an order of court, be entered up as the judgment or decree of the court, unless good cause be shown against it at the first term after the parties have been summoned to show cause against it (Code, §6161); but if a pending suit is referred by rule of court to arbitrators, such summons is not necessary, the usual practice being immediately to enter judgment in pursuance of the award, and when so entered of record, an award is enforced like any other judgment.

An award shall not be set aside, except for errors apparent on its face, unless it appear to have been procured by corruption or other undue means, or that there was partiality or misbehavior on the part of some of the arbitrators or of the umpire; but courts of equity still retain their power over awards. (Code, §6162.)

Mr. Minor, on the basis of Virginia decisions, enumerates the following cases where awards may be set aside: Where the arbitrators decide on their own view, without calling the parties before him; where they make the award without fully hearing all the evidence which can be offered on both sides; where they admit illegal evidence, or excludes that which is legal; where they refuse to allow a reasonable time to prepare for trial; where from expressions or otherwise, there appears a bias or partiality in an arbitrator's mind toward either party; where an arbitrator is ascertained to have an interest in the controversy, unknown to either party when he was chosen; where he is in anywise guilty of partiality or corruption; where the award is obtained by fraud or surprise of either party; or where an error appears on the face of the award or of some paper accompanying it, drawn up at the same time, and plainly connected with it.

Where the award is made upon submission out of court, or if the error appears on the face of papers already in a pending cause which is submitted by rule of court, relief against the award can be had only in a court of equity; but where the submission is by rule of court, that court may set aside the award for errors apparent in its face, or for misconduct of the arbitrators, umpire, or parties, as above enumerated.

If the award be good in part and bad for the rest, it may be partly set aside, if it can be done without injustice. (4 Min. Inst. 176-89.)

§5. Administrator, executor, guardian, etc., may submit to arbitration.—An administrator, executor, guardian, committee of an insane person, or trustee may submit to arbitration any suit or matter of controversy touching his estate or property, as in other cases; and he shall not be responsible for any losses sustained by a decision against it, unless it was caused by his fault or neglect. (Code, §6163.)

§6. Useful forms under "Arbitration".

No. 1. AGREEMENT TO SUBMIT CONTROVERSY TO ARBITRATION.
(Code, § 6159.)

Whereas certain questions and disputes, between A. B., of-----, of the one part, and E. G., of -----, of the other part have arisen and are now depending. Now therefore, for the finally ending all such

questions and disputes, and deciding the same, it is consented, concluded and agreed by and between the said A. B. and E. G. that the matters in controversy shall be, and they are hereby referred and submitted to the final award and determination of H. K., of-----, M. P., of-----, and J. S., of-----, or any two of them, arbitrators indifferently chosen by the said parties, so as the said arbitrators, or any two of them, do make their award or determination of and concerning the premises, in writing ready to be delivered to the said parties requiring the same, on or before the-----day of----- next ensuing the date of these presents. ("And it is hereby mutually agreed by and between the said parties, that this submission shall be entered of record in the circuit court of the county of-----," if that be the case.)

In testimony whereof, the parties to these presents have hereunto set their hands, this-----day of-----, in the year 192----

A. B.

E. G.

If the arbitrators are to be paid for their services, add the following to the foregoing form:

"The said arbitrators, for their services as such, shall each be paid the sum of \$-----, by the parties hereto, or some of them, as may be directed in the award of the arbitrators."

NO. 2. SUBMISSION TO ARBITRATION BY BOND GIVEN BY EACH PARTY.

Know all men, that I, A. B., am held and firmly bound unto E. G. in the sum of-----dollars, to be paid the said E. G., for which payment I bind myself and heirs by these presents. Sealed with my seal, and dated this-----day of-----, in the year 192----

The condition of the above obligation is such that, if the above bound A. B., his executors and administrators, shall for his and their part, in and by all things, well and truly observe, perform, and keep the award and determination of H. K., M. P., and J. S., or any two of them, indifferently chosen by the said A. B. and E. G. to arbitrate, award, and determine concerning all manner of actions and causes of action, suits, bonds, contracts, covenants, promises, accounts, reckonings, judgments, executions, controversies, trespasses, damages, and demands whatsoever, both in law and equity, at any time heretofore had, moved, sued, prosecuted, done suffered, or committed by or between the said parties, so as the award of the said arbitrators, (where there are three or more arbitrators, say "or any two of them") be made and set down in writing ready to be delivered to the said parties in difference, on or before the-----day of-----, 192---- * then this obligation shall be void; otherwise to remain in full force and virtue.

When, in the event of the arbitrators (being two) disagreeing, the award is to be made by an umpire, follow the foregoing form to

the (*), and then say: "And if the said arbitrators shall not make such their award of and concerning the premises within the time limited as aforesaid, then, if the said E. G., his executors and administrators, for his and their part do and shall well and truly observe, perform, and keep the award, determination, and umpirage of a third person to be indifferently chosen by the said parties for umpire, in and concerning the premises, so as the said umpire do make and set down his award and umpirage in writing, ready to be delivered to the said parties in difference, on or before the-----day of -----, 192--, then this obligation shall be void," &c.

When the award is to be a rule of court, add to the foregoing form the following:

"And it is hereby agreed by and between the parties, that these presents, and the submission hereby made of the said matters in controversy, shall be made a rule of the-----court of the county (or corporation) of-----, to the end that the said parties in difference shall be finally concluded by the said arbitration and award in pursuance of these presents, according to the statute in that case made and provided."

No. 3. AWARD BY ARBITRATORS.

Whereas, A. B., of-----, of the one part, and E. G., of-----, of the other part, have mutually agreed in a writing bearing date on the-----day of----- 192--, (or, in case of bond, "entered into, and reciprocally executed bonds or obligations to each other, bearing date the ----- day of-----, 192--, in the penal sum of-----, conditioned") that the said parties should, in all things, well and truly stand to, abide, perform, observe, fulfill and keep the award, order, final end and determination of H. K., of-----, M. P., of-----, and J. S., of -----, arbitrators indifferently chosen by the said parties, so as the said award of the said arbitrators should be made on or before the ----- day of-----, in the year 192--, in writing, and ready to be delivered to the said parties. Now, know ye, that we, the said arbitrators whose names are hereunto subscribed, having duly examined into the cause or causes of difference existing between the said parties by hearing the statements, proofs and allegations of both, do make and publish this, our award between the said parties, in the following manner: (The remainder of the award must be filled up as the circumstances of the particular case require.)

In testimony whereof, the parties to these presents have hereunto set their hands and seals, this----- day of-----, in the year 192--.

-----, (L. S.)

-----, (L. S.)

In case of a submission by rule of court, in lieu of the matter

down to the end of the first parenthesis, say: "Whereas, by the rule of the circuit court of ----- county, made the-----day of -----, 192--, in an action at law (or *suit in equity*), wherein A. B. was plaintiff and E. G. defendant, it was by consent of the parties given in court (or *upon proof of agreement between the parties out of court made the----- day of-----, 192--*)"

No. 4. NOMINATION OF UMPIRE BY TWO ARBITRATORS.

Know all men by these presents, that we the undersigned, H. K. and M. P., arbitrators chosen to award and determine the matter in difference between A. B. and E. G., as appears by articles of agreement made between the said A. B., and E. G., and dated the----- day of-----, 192--, not having concluded and agreed upon the premises to us referred as aforesaid, do hereby, according to and in pursuance of the power to us granted by the said articles of agreement, nominate and appoint R. S., of-----, the sole umpire in the premises, to conclude and determine, and make his final award and umpirage of all the matters, demands and differences in controversy between said parties referred to in said articles of agreement aforesaid.

In witness whereof, we have hereunto set our hands and seals, on this----- day of-----, 192--.

-----, (L. S.)

-----, (L. S.)

No. 5. AWARD OF UMPIRE.

Whereas, A. B., of -----, of the one part, and E. G., of-----, of the other part, have mutually agreed in a writing bearing date on the-----day of----- 192--, (or "entered into and reciprocally executed bonds or obligations to each other, bearing date the ----- day of-----, in the year-----, in the penal sum of-----, conditioned") that the said parties should in all things well and truly stand to, abide, observe, perform, fulfill and keep the award, order, final end and determination of H. K., of-----, and N. P., of----- arbitrators indifferently chosen by the said parties, of and concerning all and all manner of action and actions, suits, bills, bonds, specialties, covenants, contracts, promises accounts, reckonings, sums of money, judgments, executions, quarrels, controversies, trespasses, damages and demands whatsoever, both in law and equity, committed or depending by or between the said parties, so as the said award of the said arbitrators should be made on or before the -----day of -----, in the year 192--. But if the said arbitrators should not make such their award of and concerning the said differences and disputes by the time

aforesaid, then if the said parties should in all things well and truly stand to, abide, observe, perform, fulfill and keep the award, order arbitrament, umpirage, final end and determination of such person, as should thereafter be chosen by the said arbitrators between the said parties of and concerning the said differences, so as the said umpirage should make his award or umpirage of or concerning the same, on or before the-----day of-----, 192---. And whereas, the said H. K. and M. B. met upon the said arbitration, and did not make their award between the said parties by the time limited in and by the said agreement (or the conditions of the said bonds), and in pursuance of the said agreement (or bonds), have in writing chosen and appointed me as umpire to settle and determine the matters in difference between the said parties. Now know ye, that I, R. S., the umpire named and chosen as aforesaid, and having heard and examined, as well the said parties as their respective attorneys and their respective witnesses, proofs and allegations on both sides, of and concerning the said disputes and differences between them, and fully considered the same and the matters referred, do make this my award and umpirage, in manner following, that is to say (here the award must be inserted, according to the various cases; the conclusion may be as follows): And upon the payment of the said sum of----- (or performance of the required condition), I do award and direct that the said parties shall duly execute and deliver to each other mutual relinquishment in writing of all and every action and actions, cause or causes of action, damages, claims and demands whatsoever, subsisting or depending on or before the said ----- day of -----, 192---

In testimony whereof, I, the said S. T., have set my hand and seal, this-----day of-----, in the year 192---

R. S. [L. S.]

ARCHITECT AND BUILDER

See Liens of Mechanics and Others

- § 1. Building contract
- § 2. Rights, duties, and liabilities of architect
- § 3. Rights, duties and liabilities of builder or contractor
- § 4. Certification and license tax of architects, etc.
- § 5. Facts for builders
 - (1) As to stone
 - (2) As to brick
 - (3) As to plastering
 - (4) As to laths
 - (5) As to shingles
 - (6) As to slating
- § 6. Forms of contracts under "Architect and Builder"

§ 1. **Building contract.**—Such contract is governed by the law of contract in general—see *Contracts*. It would be well to insert in the contract one or more of the following provisions, which have been held valid: (1) That the builder or contractor, shall not assign any money payable under the contract, unless with the assent of the owner; (2) that the owner may notify the builder to discontinue work under the contract; (3) that the builder shall give bond within a stated time; (4) that the certificate, estimate, or decision of an architect or engineer, or some other person shall be final and conclusive, as to disputes concerning the meaning or construction of drawings and specifications, or any other matter of difference; (5) that on failure of the builder to complete the work according to contract, other persons may be employed; (6) that the builder will comply with the building law, which is not specified in the contract; (7) that no deviations from the contract, specifications, or drawings will be permitted except with the sanction in writing of the architect or engineer; (8) that the builder will not sub-contract the work without the written consent of the owner, architect, or engineer; (9) that no extra shall be claimed unless directed in writing; (10) that the builder shall not be liable for any deficiency or error in the plans or specifications; (11) that the builder shall pay certain and fixed reasonable damages for delay or other default; (12) that the owner may retain money due the builder to pay material men or laborers so as to avoid mechanic's liens. (See general common law authorities.)

§ 2. **Rights, duties, and liabilities of architect.**—His agency is not general, but his power as agent of his employer is limited by the contract between them. Unless specially authorized, he cannot change, alter, or modify the contract between the owner and builder, nor bind the owner for materials or labor. He must act in good faith toward his employer, and with ordinary skill, ability, care, and attention; but is not required to exercise extraordinary care, nor to guarantee a perfect plan, or a satisfactory result free from all miscalculations. His power to reject defective material or work, if discoverable by ordinary care, must be exercised promptly, else the defects will be considered waived. Only a real and

substantial failure to perform the contract, will justify the architect from refusing to give his decision, estimate, or certificate. Such decision, etc., when given is final, when the contract so provides, and can only be impeached for fraud or such gross mistake as would imply bad faith. The architect is responsible, not only for fraud, but also for negligence, or failure to exercise ordinary care, as where he permits inferior material to go into the building, and the like. (See general common law authorities.) See, also, *Licenses and License Taxes*, section 36.

§ 3. Rights, duties, and liabilities of builder or contractor.—He builds according to contract and the plans and specifications, and is not required to follow the directions of the architect that departs therefrom, nor to do work not shown by them. He is bound to a substantial performance; a general compliance with plans is not sufficient. He must not willfully or carelessly depart from minute details; leave his work incomplete in any material respect; make deviations and omissions greatly saving to himself and equally damaging to the owner, or which are so substantial that they cannot be remedied or adequately compensated for; or omit work that cannot be done except at great cost or with great risk to the building. The builder must perform his work in a workmanlike manner, like a skilled workman would do it, using ordinary skill and care, not only in the work, but also not to hurt an employee or a passers-by. Where the owner has general direction and control, he would be liable for such injuries—jointly with the builder if both are negligent. The builder is liable to the owner for defective performance due to departure from plans or soil or weather conditions, to be recovered by action or to be deducted from the contract price. The stipulated time of performance is of the essence of the contract, and providential causes of delay is no legal excuse, but delays caused by the owner gives him that much additional time; and he is allowed extra time for extra work or where changes are made in original plans. Unless prevented by act of God (as death), the law, or his employer, which renders performance absolutely impossible, nothing will excuse failure to perform, not even destruction of the building, before completion, by fire, lightning, windstorm, or flood, nor a

latent defect in the soil, or insolvency of the owner. Even where there is no provision in the contract to that effect, upon default of the builder to complete the building, the owner may take possession, and if he desires he may employ another builder. As to acceptance of the building, this may be either express, or implied from the conduct of the owner. Mere naked occupancy or use is not a sufficient acceptance. Nor does part payment, standing alone, amount to an acceptance or waiver of defects known or unknown. While acceptance waives apparent defects, it does not preclude the owner from showing that the work was not done in a workmanlike manner and from claiming damages caused by such latent defects. Where the builder voluntarily and without justification abandons his work before it is finished, he has no right to any compensation. (See general common law authorities.)

For lien of builder, see *Liens of Mechanics and Others*.

§ 4. Certification and license tax of architects, etc.

For examination, certification, practice, etc., of professional engineers, architects and land surveyors, see Acts 1920, p. 496. For license and license tax of architects, see *Licenses and License Taxes*, sections 35 and 36.

§ 5. Facts for builders.—The following facts will be found useful to builders:

(1) *As to stone.*—To find the number of perch (24.75 cu. ft.) in a wall, divide the number of cubic feet in the wall by 22; divide by 24.75, if the needed quantity of stone is desired. For 100 cubic feet of wall it requires about 75 cubic feet of stone, 3 bushels of lime, and a cubic yard (or 21 bushels) of sand.

(2) *As to brick.*—A brick is usually 8x4x2 inches; and 27 brick make one cubic foot of wall without mortar or 20 to 22, with mortar.

Five courses of brick will make one foot high. To find the number of brick in a wall, multiply the length, height, and thickness (in feet) together, then deduct the product of the length, height, and thickness of the doors and windows, and then multiply the remainder by 20, 21, or 22, according to the thickness of the mortar joint. If the wall is 8 inches thick and without doors or windows, multiply the product of the length and height by 15 (8 in. being $\frac{2}{3}$ of a foot, and $\frac{2}{3}$

of 22, being about 15). Or for each square foot of wall, 4 inches thick, allow $7\frac{1}{2}$ brick; for 13 inch wall, $22\frac{1}{2}$ brick, and so on, allowing $7\frac{1}{2}$ brick for each additional 4 inches in thickness of wall. In this last estimate, the brick is $8\frac{1}{4} \times 4 \times 2\frac{1}{4}$ inches.

(3) *As to plastering.*—Six bushels of lime, 32 bushels (or 40 cubic feet) of sand, and $1\frac{1}{2}$ bushels of hair will plaster 100 square yards two coats.

(4) *As to laths.*—Laths are 4 feet long and $1\frac{1}{2}$ inches wide. It takes about 16 laths to the square yard, or 1,000 for 70 square yards; and 11 pounds of nails to 1,000 laths.

To find the number of laths required, multiply the number of square yards by 16.

(5) *As to shingles.*—Shingles are usually 16 inches long and average about 4 inches wide, and are put up in bundles of 250. One bundle of 16-inch shingles will cover 30 square feet; 18-inch shingle, 33 square feet. When laid 5 inches to the weather, 5 pounds 4-penny or $3\frac{3}{4}$ pounds 3-penny nails will lay 1,000 shingles.

To find the number of shingles in a roof multiply the length of the ridge pole by twice the length of one rafter (in feet), and if the shingles are to be exposed $4\frac{1}{2}$ inches to the weather, multiply this by 8, and if 5 inches to the weather, multiply by $7\frac{1}{5}$.

(6) *As to slating.*—Slate is usually 12×16 , 14×9 , 18×9 , or 24×13 inches, and the thickness ranges from $\frac{3}{16}$ to $\frac{5}{16}$ of an inch; and they weigh about 2.6 to 4.5 pounds per square foot. The lap varies from 2 to 4 inches, the standard being 3 inches.

To find the number of slates of a given size required per square, subtract 3 inches from the length, multiply the remainder by the width and divide by 2. Divide 14,400 by the number so found.

§ 6. Useful forms under "Architect and Builder."

NO. 1. AGREEMENT FOR BUILDING A HOUSE, THE OWNER FURNISHING THE MATERIAL.

Be it remembered, that on this..... day of....., 192--, it is agreed between C. C., of....., and D. D., of....., in manner and form following to-wit:

The said D. D., for the consideration hereinafter mentioned, doth, for himself and his heirs, covenant and agree with the said C. C., and his assigns, that the said D. D., shall and will, within the space of ----- months next after the date hereof, in good and workmanlike manner, and with proper art, judgment and skill, at -----, well and substantially erect, build, set up and finish, one house according to the draft or scheme hereunto annexed, of the dimensions and description following, to-wit: (describe it). And to compose the said house with such stone or brick, timber or other materials, as the said C. C., or his assigns, shall find and provide for the same. And the said D. D., for himself and his heirs, doth covenant and agree that he will pay to the said C. C., or his assigns, as and for stipulated or liquidated damages, ----- dollars for each and every day that the said house shall remain and be unfinished after the lapse of the said period of ----- months next after the date hereof.

And the said C. C., in consideration thereof, doth, for himself and his heirs, covenant and agree with the said D. D., to pay to the said D. D., or his assigns, the sum of ----- dollars, in manner following, to-wit: ----- dollars, part thereof at the beginning of the said work, ----- dollars more, another part thereof, when the said house shall have been completely roofed, and the remaining ----- dollars, in full for the said work, when the same shall be completely finished. And also, that the said C. C., or his assigns, shall and will at his or their own proper expense and charges, find and provide all the stone, bricks, timber, shingles, and other materials necessary for making and building the said house.

This agreement is signed in duplicate, each party holding a copy.

Witness the hands and seals of the parties the day and year first above written.

C. C. (SEAL)

D. D. (SEAL)

No. 2. AGREEMENT FOR ERECTION OF SEVERAL BUILDINGS.

Articles of agreement entered into this ----- day of -----, in the year 192--, between D. D., of -----, of the one part, and C. C., of -----, of the other part:

Witnesseth, that the said D. D., for himself and his heirs, doth covenant and agree with the said C. C., and his assigns, that the said D. D., shall and will, on or before the ----- day of -----, 192--, for the considerations hereinafter mentioned, in good and workmanlike manner, and with proper art, judgment, and skill, erect, build, set up and finish, upon the lot belonging to the said C. C., in the city of -----, known in the plan of said city as lot number -----, the several edifices and buildings set forth in the schedule, proposal, or estimate hereunto annexed; and also that the said D. D., shall and will execute all and singular the works mentioned in said schedule,

as therein described and set down, in good, workmanlike, and substantial manner, with all proper art, judgment, and skill. And that all the said buildings, erections, and works shall be executed, done, and finished to the good-liking and satisfaction of -----, or any other person whom the said C. C., shall for that purpose name and appoint, to be testified by a certificate in writing under the hand of the said -----, or other person aforesaid. And that the said D. D., shall and will find and provide good, proper, and sufficient materials of all kinds whatsoever, and of the best quality, for erecting and completely finishing the said buildings, edifices, erections, and works.

And the said C. C., for himself and his heirs, doth covenant and agree with the said D. D. and his assigns, that the said C. C., or his assigns, shall and will pay to the said D. D., or his assigns, within ----- days next after the said buildings, edifices, erections, and work shall be completely built, erected, done, and finished as aforesaid, the sum of -----.

And it is agreed between the said parties that in case the said C. C. or his assigns shall direct any more or other work to be done in or about the said building, works, and premises, than what is contained and specified in the said schedule hereunto annexed, the said C. C., or his assigns, shall and will pay to the said D. D., or his assigns, so much money as such extra work shall be worth upon a reasonable valuation; and in case the said C. C., or his assigns, shall think fit to diminish or omit any part of the work specified in the said schedule hereunto annexed, then the said D. D., or his assigns, shall and will deduct and allow out of the money aforesaid agreed to be paid him for the work aforesaid, so much money as the work to be diminished or omitted shall amount to upon a reasonable valuation.

And for the performance of all and each of the articles and stipulations above mentioned, the said C. C. and D. D. do bind themselves and their heirs and assigns, each to the other, in the penal sum of ----- dollars.

This agreement is signed in duplicate, each party holding a copy.

Witness the hands and seals of the parties, the day and year first above written.

C. C. (SEAL)

D. D. (SEAL)

No. 3. "UNIFORM CONTRACT," WHERE ARCHITECT HAS SUPERVISION OF THE WORK.

(The "Uniform Contract" is a form adopted and recommended for general use both by the American Institute of Architects and the National Association of Builders, and being copyrighted by the former to be sold in the form of blanks, it cannot be inserted here, but may ordinarily be had at stationers, or from E. G. Sollmann, 134-40 W. 29th St., New York. After the usual introductory part, it has twelve articles, as follows):

Article I. As to contractor providing all material and labor.

Article II. As to supervision of architect and providing that his construction of the drawings and specifications are to be final, and that the drawings shall belong to him.

Article III. As to alterations and allowances therefor.

Article IV. As to inspection of architect and removal of all material and work condemned.

Article V. As to failure of contractor to prosecute the work with diligence, or other failure, providing that upon certificate to that effect from the architect, the owner may, after notice to the contractor, proceed with the work, charging the cost to the contractor.

Article VI. As to the time the several portions of the work and the whole shall be completed.

Article VII. As to delay caused by owner, architect, or other contractor, or by fire or other casualty, or by strike, giving the contractor credit therefor.

Article VIII. As to owner providing all labor and material not embraced by the contract promptly, he to compensate the contractor for any such delay.

Article IX. As to the contract price and when paid, and retaining sufficient amount to pay off any lien or claim for labor, or material.

Article X. As to certificate by architect or payment by owner, (except final certificate or payment), not to be evidence of performance of contract or acceptance of defective work or improper materials.

Article XI. As to insurance by the owner, during the progress of the work, payable to the parties to the contract, "as their interests may appear."

Article XII. As to arbitration of matters of payment, allowance or loss in Articles III or VIII, or in case either dissents from decision of architect in Article VII.)

No. 4. CONTRACT WITH SPECIFICATIONS.

This agreement, made and entered into, this the-----day of June, 192... by and between O. B., of the first part. and C. C., of the second part, both of the city of Roanoke, Virginia.

Witnesseth, The said C. C., for the consideration hereinafter mentioned, covenants and agrees that he shall and will furnish and provide at his own proper costs and expense all the material, supplies and labor, and shall and will, well and sufficiently erect, finish and deliver in a true, perfect and thorough workmanship manner, a residence on the said O. B.'s lot, on Tenth Avenue, Southwest, Roanoke, Virginia, according to plans, drawings and details prepared for the said residence by A. R. architect, Roanoke, Va., and according to type-

written specifications signed by the said parties and attached hereto and made a part hereof.

The said C. C. agrees to complete the said residence as above specified within one hundred days from the date hereof, but should he fail to do so within that time, then he shall pay or allow the said O. B., by way of liquidated damages, the sum of one dollar per diem for each and every day thereafter the said work remains incomplete; but if the said residence is completed before the expiration of one hundred days from this date, then the said O. B. is to pay the said party of the second part at the rate of two dollars per diem for each and every day from the time of the completion of the said work to the expiration of the said one hundred days.

The said O. B., in consideration of the premises aforesaid, covenants and agrees to pay to the said C. C. the sum of \$4,000, as provided in the specifications (or "as follow: (1) Whenever the said residence is framed in and put under roof, then the said O. B. is to pay to the said C. C., the sum of \$1,000; (2) whenever the said residence has been brown-coated, ready for the finishing coat of plastering, then the said O. B. is to pay to the said C. C., the sum of \$1,000; and, (3) whenever the said residence has been fully completed, according to plans, specifications, and details, then the said O. B. shall pay to the said C. C. the sum of \$2,000"). But the said payment of \$2,000 (or "\$4,000") is not to be made as aforesaid until the said C. C. has produced vouchers showing that all bills for material and labor have been paid for and a writing showing that all claims which might be liens on the property, have been released, so that the said residence shall stand free from all liens or right to claim or file liens for materials furnished or labor done.

Witness the following signatures and seal.

O. B. (SEAL.)

C. C. (SEAL.)

SPECIFICATIONS FOR FRAME BUILDING.

Specifications of the material and workmanship required and to be furnished for the erection of a frame residence at Roanoke, Virginia, for O. B., with cement or brick foundation, and shingle roof, in accordance with drawings and this specification prepared by A. R., architect, Roanoke, Va.

GENERAL AND SPECIAL CONDITIONS.

The contractor shall give his personal superintendence to the work, and furnish all materials, labor, transportation, scaffolding and appliances necessary for the full performance of the work, except as may be definitely excepted in the specifications. He is to lay out the work and be responsible for

its correctness, and for any accidents or damage arising out of the performance of the work, and for any violations of the city ordinances. He is to be responsible for all materials whether incorporated in the building or not, and is to keep the work fully insured; and policies are to be drawn, that the loss, if any, is to be paid to the owners as their interests may appear.

All workmanship is to be performed in first-class manner and acceptable to the architect, who is to have power to reject any materials or labor which, in his judgment, do not fulfill the true intent and meaning of the drawings and specifications.

The drawings and specifications are to be considered as co-operative; and the work or materials called for by one and not indicated in the other, is to be furnished and done as though fully treated in both. If no figures or memoranda are given, drawings are to be followed according to their scale, and any finish not fully shown but evidently necessary to complete the work is to be furnished and executed like what is shown or described.

The drawings and specifications furnished for this work, and which are to form a part of the contract, are instruments of service and the property of the architect, and are to be returned to him on completion of the work. For the purpose of this work, the architect is not to be regarded as the agent of the owners (who are one of the contracting parties), but as a disinterested and expert judge, who will decide all questions arising as to the true intent and meaning of his drawings and specifications, and who will issue certificates for payments from time to time during the work, reserving in each case twenty per cent. of the value of all materials and work satisfactorily incorporated in the building. No changes are to be made without written order of the architect, and the adjustment of the cost for same, whether allowance or extra cost, is to be made at that time.

The contractor is to keep the building and premises in a cleanly condition; free from undue accumulations of rubbish or surplus materials, and at completion is to remove any paint spots from glass, walls, or floors, and to sweep out for occupancy on or before the 15th day of September, 192..... The

owners reserve the right to reject any or all bids submitted and to require satisfactory bond for the contract.

MASONRY.

1. *Excavation and grading.*—Excavate for foundations as called for by plans to exact depths required and true to lines, levels, and measurements. At highest corner of the building the foundations will be carried down to a depth of 24 inches, to provide against a possible future lowering of the grade, and the soil at this point is to be taken off to a depth of ten (10) inches and running back level and to upper lot line. This soil is to be placed on lower part of front of lot partially to level the grade. Fill in around all foundations after they have been inspected and the mortar hardened, filling up the trenches in such a manner as will prevent water standing.

2. *Concrete foundation.*—All foundation walls, if concrete, will be composed of one part universal Portland Cement, or its equal, three parts clean sharp sand, and five parts clean gravel or broken stone. In order to make these proportions efficient, it will be necessary in mixing and applying the materials to use great care. The contractor under the directions of the architect, will construct a cube eighteen inches square, to measure the sand, cement and stone according to above proportions. The sand and cement must first be mixed thoroughly while dry, turning over at least four times so that no uncolored particles of sand can be detected after having been thoroughly mixed. Add just enough water to dampen the mass thoroughly. The aggregate is then mixed in and turned three times. All walls to have footings. The concrete above ground is to be placed in form and thoroughly rammed. A smooth surface or spade is forced down just inside the planking to force the aggregate from the face of the wall until clear mortar only will show. All exposed walls to be stuccoed and blocked 9x22 inches. Put down footings under all walls, piers, etc., the full width indicated on plan.

(If brick is used instead of concrete omit the above, and say: "The foundation wall shall be of brick. The brick shall be wet when laid in dry warm weather, and dry when laid in damp or wet weather. Use sound well burned brick through-

out the building. The outside exposed brick to be select and must to tied every sixth course. All walls to be built plumb and true. Joints must not exceed three-eighths of an inch, and must be neatly pointed. All brick to be laid in lime mortar. All brick walls when thoroughly dry, must be cleaned with acid and neatly penciled".)

3. *Chimneys and fireplaces.*—All flues are to be smoothly plastered their entire length and a 6 in. terra cotta thimble set three feet below ceiling for kitchen range use. The chimneys are to be carried clear of all framing and the fire places left with 12 in. jambs in skeleton form for fire brick linings. Turn half-brick trimmer arches under all hearths. Line all fireplaces with fire brick laid in fire-clay; the shapes of the fire boxes and throats are to be as per special instructions of the architect (not involving extra cost); no other shapes will be accepted. The hearths are to be bedded with concrete, and hearths and facings faced with plain tile, the colors and quality of which are to be determined by the architect. Mason will also set the tile frames and grates.

4. *Stone work.*—Use artificial stone for piers and curtain walls of front porch as shown on plans, and for all visible portions of the chimneys. This stone is to be of the best water-proof quality and may either be solid or hollow blocks. To be laid in cement mortar of same consistency as material in stone, neatly pointed and cleaned down. All lines, levels, and measurements are to be accurate.

5. *Cement steps and sidewalks.*—Provide the cement steps to front porch; a platform step at start or rear steps; and the cement walk and curbing from front steps to sidewalk in quality and manner the same as are furnished by the city.

LATHING AND PLASTERING.

1. *Lathing.*—All walls, partitions, and ceilings to be lathed with a good pine lath, half seasoned. These laths shall be put one-fourth inch apart with four nailings to each lath, joints to be broken at every tenth lath. No lath shall be put on vertically, nor run through behind studs from one room to another, the plasterer seeing to it that all angles are solidly formed and that the furring is securely nailed before the laths are put on. All partitions to be bridged once in

their height. The angle on each side of partition to be made solid by spiking a 2x8 back of 2x4, thus forming a T. This will prevent cracks showing in angles.

2. *Plastering*.—Plaster all walls, ceilings and partitions over the lathing just described with three coats of plaster to be mixed according to directions of manufacturers and applied as follows: First, apply a good scratch coat of Ivory Cement over the laths, comb, and allow mortar to set well, but not thoroughly to dry. Apply the second coat of same plaster, plumb, and true. When dry, finish with lime putty, white sand, and plaster skimmed on and floated with a caulk float to a perfect, even, and true surface. No "cat faces" or other imperfections will be allowed. (If other finish in desired, instead of above say: "All walls, ceilings and partitions are to be plastered with one good coat of brown, well-haired mortar, and finished with good hard finish composed of calcine plaster and lime putty. All walls to be finished straight and plumb; and all angles to be maintained sharp and regular in form.")

Do all the required patching of plaster work after the other craftsmen have finished their work, repair all damaged plaster and cracks, leaving the work in a first-class condition in all respects and without room for exception.

CARPENTER AND TIN WORK.

1. *Framing*.—All timber, not otherwise specified, shall be sound, square-edged stock, free from dry rot, large knots, or splits and reasonably well seasoned. The sills are to be two-thirds heart. Sizes and construction are shown by detail drawings.

2. *Sheathing*.—Roofs, floors and walls are to be sheathed solidly with No. 3 sheathing, but throwing out all planks with loose knots, and leaving no part of the surfaces uncovered. Sheathing is to be securely nailed on each edge to every bearing, and no butt joints except over timbers.

3. *Bridging*.—Cross-bridge all floor joists with 1x3, leaving no span over ten feet. Ends of all bridge rows to discharge solidly against walls.

4. *Headers and trimmers*.—All header and trimmer joist and those under partitions, and all studs around open-

ings and the plates, are to be doubled, and spiked together every three feet.

5. *Furring and grounds*.—Plastered ceilings are to be cross-furred every 16 inches, and grounds run accurately behind all finish, such as base, wainscots, casings, and other trimmings.

6. *Shingles*.—Cover the main roof and faces of gables with No. 1 pine shingles, double nailing all ridges, eaves, valleys and gables.

7. *Tin work*.—Valley tins to be 20 inches wide, and of old method tin, painted both sides. Porch roofs to be of old method tin, well locked and joints soldered with half-tin and half-lead solder, using resin as the flux. All resin to be cleaned off before paint is applied.

8. *Paper*.—Use double thickness of heavy, rosin-sized felt paper under tin roofs to deaden the sound.

9. *Ridge rolls*.—Use galvanized iron ridge and hip rolls, finishing all connections of same neatly and securely.

10. *Flashings*.—Use old method tin flashings over window caps, cornice covers and all other places likely to leak; also flash around chimneys, and balustrades.

11. *Gutters and leaders*.—All cornice gutters are to be of IX old method tin neatly dressed down, leaving no sags, turning edges back to a $\frac{1}{4}$ in. drip over mouldings. Form tubes at outlet, flare on top, and solder well to gutter. Use tinned nails wherever exposed. Furnish and substantially hang all eaves with galvanized iron, hanging gutters with galvanized iron hangers and straps. Grade accurately to outlets. Galvanized iron leaders where indicated on plans, substantially supported with galvanized iron straps, and connected at foot with terra cotta drains.

12. *Siding*.—Cover the outside wall with dry No. 2 clear sap, square-edged narrow siding, showing not over four and one-half inches to the weather, and nailed to every bearing with 6-penny cut nails. All butt joints to be made over studs. Cut close, neat joints against corner boards, casings, etc. In all spacing less than five feet the siding boards are to be in one piece. No butt joints to occur in first course over openings.

13. *Outside finish*.—All outside finishing lumber, mold-

ings, etc., shall be from clear sap No. 2 pine, well seasoned; and shall be worked to conform to scale and detail drawings, and to be primed by painter as soon as practicable after being placed in position.

14. *Water table*.—Use no water table or base at bottom of siding, but conform to detail drawings.

15. *Porches*.—All porch construction and finish are clearly shown on the drawings. The columns are to be 10 in., with Corinthian caps. Porch flooring is to be 1 1/8 in. thick x 3 1/4 in. wide tongue and groove, heart-face, mill dressed stock, thoroughly well seasoned, and spread bottom up to shrink. While thus exposed, paint the under side one coat lead and oil, and also fill joints with lead when laying the floor, and give top surface a coat as soon as laid. All exposed joints in columns and rails are also to be filled with lead. Ceil overhead with 3/4 in. x 3 1/4 in., matched ceiling, well cramped up and blind nailed to every bearing. Make all butt joints over joists.

16. *Lattice*.—Back porch is to be latticed diagonally with dressed lattice and quarter round run around all edges. Clinch nails twice in the heights. Make strong lattice frames and panels between outside piers as shown on drawings, and furnish a door under back steps.

17. *Scuttle*.—Provide a scuttle or man-hole with hinged cover, 2 feet x 3 feet in second story hall ceiling to give access to the attic.

18. *Ventilators*.—Provide the ventilators as shown by the drawings together with glazed sash and frames and outside trim. Backs of ventilators to be covered with galvanized wire cloth. The ventilating panels under main cornice are also to be finished with galvanized wire cloth, secured with moldings in a regular and neat system. Use the wire cloth also over the opening back of siding at the sill line.

19. *Steps*.—Outside steps are to have strong rough carriages, 1 1/8 in. x 3 in. strips for treads showing a small spacing between, and 7/8 in. risers.

20. *Interior finish*.—The upper or finishing floors in first and second stories shall not be laid until all plastering is completed and dried out; nor shall the material thereof,

nor doors or other finishing materials, be brought on the premises until proper provision is made for its protection from dampness, injury from lime, etc.

21. *Floors*.—Clean off the rough floors, and lay heavy-weight, rosin-sized felt paper over entire first floor. Finishing floors to be of No. 1 common, standard, mill-dressed, matched flooring, $\frac{7}{8}$ in. \times $3\frac{1}{4}$ in., well driven up and blind nailed. All stock to be thoroughly kiln-dried, and the best selected for the reception-hall, parlor, and dining-room. Protect these floors from paint and varnish spots.

22. *Window and door frames*.—All window and door frames are to be made to details furnished, with all pulley stiles, parting beads, pockets, weights, braided sash cord, and cast iron weights, blind stops and sills and outside casings complete.

23. *Sash*.—Use $\frac{3}{8}$ in. white pine check-railed sash, primed on outside before glazing, and well tacked and put-tied, using D. S. "A", American Glass for reception-hall, and parlor and D. S. "B", glass in all other rooms.

24. *Transoms*.—Transoms where indicated on plans are to be single lights, "D. S. "B", glass, and pivoted.

25. *Doors*.—Front and side entrance doors are to be $1\frac{3}{4}$ in. thick, hung on three hinges; to have plain, plate glass upper panels, and raised panels and raised molding lower panels; glass to be set with wood stops (no putty). Rear hall door to be $1\frac{3}{4}$ in. thick, OG stiles and rails, and glazed with small lights in D. S. "A" glass, set with wood stops. All other single doors to be $1\frac{3}{8}$ in. thick, OG stiles and rails, and horizontal panels.

26. *Doors*.—Sliding doors to be $1\frac{3}{4}$ in. thick, OG stiles and rails and horizontal panels. All $1\frac{3}{4}$ in. doors are to be "AA" grade for oil finish and others "A" grade.

27. *Tracks, hangers, and pockets*.—Use ball bearing, adjustable, tubular hangers with all fittings complete and properly set for sliding doors, and line the pockets with matched ceiling.

28. *Blinds*.—All double-hung windows are to have $1\frac{1}{8}$ in. white pine blinds with rolling slats, and hung with wrought iron hinges and inside catches on each blind.

29. *Hardware*.—Contractor will figure an allowance of

fifty dollars for finishing hardware, which is to be selected by the architect.

30. *Saddles*.—All doors (except sliding doors) shall have $\frac{5}{8}$ in. beveled heart pine saddles on floor, well fitted around jambs and plinths.

31. *Trim and base*.—All windows and doors shall be trimmed to conform to the detail drawings, and base to be $\frac{7}{8}$ in. x 8 in. plain, with $1\frac{1}{2}$ in. mold on top and OG stop against floor. Trimming in reception-hall, parlor and dining-room and stairs to be No. 1, and sandpapered and scraped for hard oil finish. All other finish is to be stained or painted.

32. *Wainscoting*.—The kitchen, pantries, and bath rooms are to have double V jointed, $\frac{3}{4}$ in. x $3\frac{1}{4}$ in. matched wainscoting 4 in.-6 in. high, with 6 in. plain base, and OG stop against floor, and a 3 in. molded band-mold cap.

33. *Picture mold*.—Run $1\frac{3}{4}$ in. picture moulds around eight rooms and two halls.

34. *Closets and pantries*.—Fit up the pantries and closets completely, as indicated on the drawings, with all sashes and shelving and hooks, using rabbeted and molded shelf cleats throughout. All shelving is to be hand-smoothed and sandpapered and neatly fitted.

35. *Stairs*.—Build the stairs with substantial, rough carriages, $1\frac{1}{8}$ in. nosed treads, $\frac{7}{8}$ in. risers; closed and paneled strings; $1\frac{3}{4}$ in. turned balusters; boxed and mitred plain newels; $2\frac{1}{2}$ in. x $3\frac{1}{2}$ in. handrails; $\frac{7}{8}$ in. scotia under all nosings; all to conform to the detail drawings and of first-class workmanship. The treads and risers are to be cut in and not housed.

36. *Drip board and sink back*.—Carpenter will make a neat ash or cypress drip board, 2 ft. 6 in. long, and a splash back to sink.

37. *Angle beads*.—Use $1\frac{3}{4}$ in. turned angle beads with molded ends six ft. high over all exposed plaster angles.

MANTELS, ETC.

The contractor will allow two hundred dollars for the architect's selection of mantels, tile, frames, grates, summer fronts, contractor to deliver and set same. (Or, "All mantels, grates, and tile for hearth facing, etc., to be furnished by

the owner, but erected by the contractor, who is to furnish lime, sand, and cement for setting.")

PLUMBING.

The plumber is to furnish all materials and perform all requisite labor for the execution and completion in a workmanlike manner of all the plumbing in accordance with the plans and specifications and the rules and regulations established by the local authorities. The carpenter will do the necessary cutting and refitting of wood work.

Use 4 in. standard, cast iron, soil pipe, with 4 in. Y branches for water closets, and 2 in. Y branches for other fixtures, and all vents, clean-outs, and traps to make a sanitary job. Connect system and lay a 6 in. glazed, terra cotta drain pipe with cemented joints and connect with street sewer. Flash around soil and vent pipes at roof with sheet lead (6 lbs.) and make storm-tight. Supply the system with water from street mains, and hot water supply system from boiler to bath tub, sink, and lavatory. Make the connections with the water back of kitchen range and provide stop-cocks to hot water system and a main cut off operated from the kitchen. All exposed supply pipes are to be frost proofed in any approved manner. All exposed supply and waste pipes in kitchen and in bath-room are to be nickle plated, and formed with neat bends and runs. All fittings are to be nickle plated. Set where shown on the plans, one 5 ft. 6 in. roll rim, enameled iron bath tub, No. 1 guaranteed, one enameled iron lavatory with an oval 19 in. x 15 in. bowl, 15 in. back and apron, cast integral; one porcelain siphon-jet water closet with oak seat and low flush tank; one servant's closet, earthenware, front wash-out, oak seat and high tank; one kitchen sink 18 x 30 in. enameled iron, on nickle-plated brackets and with ash drain-board and splash back; one 40-gallon, galvanized-iron, tested water boiler, on pedestal, and provided with sediment pipe and round-way stop cock. Provide one hose bibb in front and one in back yard.

GAS FITTING.

Pipe the house for gas supplied from the city main, with meter under the house. Use 1¼ in. galvanized-iron service

pipe to the meter, with stop cock, continue the main of $1\frac{1}{4}$ in. pipe and $\frac{3}{4}$ in. risers wrought-iron pipe. All branches to be taken from top or side of running lines. Running lines to be free from sags or traps and all graded to the meter. There shall be in all _____ gas outlets. All side lights shall be six feet from the floor; the nipples projecting $1\frac{1}{2}$ in. from the studs and capped. Ceiling lights are to be accurately centered and plumbed. The drop lights in reception-hall, parlor and dining-room are to have $\frac{1}{2}$ in. branch pipes and all others $\frac{3}{8}$ in. Provide and fit a $\frac{3}{4}$ in. pipe to supply gas stove in kitchen. All pipe ends shall be reamed and joints made in red lead, and the system satisfactorily tested.

ELECTRICAL WORK.

House is to be wired for electrical lighting in accordance with insurance and city regulations, giving the same outlets as for gas, and in combination therewith, with exception that the porch lights are to be electric only. All drop lights are to be controlled from wall switches, provided with finished boxes. Porch lights are to have separate switches and hall lights are to be operated from either hall. Contractor will allow seventy-five dollars for combination lighting fixtures to be chosen by the architect (or *owner*) and put up by the contractor.

PAINTING AND VARNISHING.

Paint all exterior wood work with three coats "Atlantic" or "American" white lead, and pure linseed oil, in three colors selected by the architect (or *owner*). All tin work and galvanized iron work to have two coats Princes Metallic paint, in boiled linseed oil. Reception-hall, parlor, dining-room, and stairs are to be filled and finished with two coats Berry Brothers light hard oil finish, sand-papering between coats. Balance of interior work to be finished in three coats paint in colors to suit architect (or *owner*). Bath-tub and sink are to have three coats white and one coat white enamel. All walls and ceilings are to have two coats of Plastico in best manner and in tints selected by the architect (or *owner*) Reception-hall, parlor and dining-room to have stenciled friezes.

Signed and made a part of the contract of even date herewith, this the _____ day of _____, 192____.

O. B.
C. C.

ARREST

See "Arrest, Commitment, and Bail" under *Justice of the Peace* (div. V.)

- § 1. Arrest by private person, without warrant
 - (1) Upon view of a felony
 - (2) Upon suspicion of a felony
 - (3) To prevent an offense
 - (4) What to be done with party arrested
- § 2. Arrest by officers, without warrant
 - (1) By a constable
 - (2) By a town sergeant
 - (3) By a sheriff
 - (4) By a justice
 - (5) By a coroner—See *Coroner*
 - (6) Formal warrants dispensed with in certain trials before justices in cities and towns
- § 3. Warrant of arrest. See *Justice of the Peace*, div. V., ("Arrest, Commitment and Bail")

§ 1. Arrest by private person without warrant.—

(1) *Upon view of a felony.*—A private citizen, who is present when a felony is committed, or a dangerous wound is given, is enjoined by law to arrest the offender, on pain of being punished for a misdemeanor, if he escapes through his negligence; and for this purpose he may break open doors in pursuit of him upon demand and refusal, and even kill him, if he cannot otherwise be taken; though if he be killed by the offender, it is murder. (H's. G. & M., p. 470.)

(2) *Upon suspicion of a felony.*—A private person is permitted, though not enjoined by law, to arrest a felon upon suspicion; but he does so at great peril; for, if it should turn out that no felony was committed by any one, or, if committed, that he had not probable ground to suspect the party arrested, he is liable to an action; and if doors be

broken, he is liable for that, unless he can prove the party guilty; and if either party is killed, it is manslaughter. A private person may likewise arrest one indicted for felony. (H's. G. & M., p. 471.)

(3) *To prevent an offense.*—Any individual may lawfully lay hold of another, to prevent a felony or an offense against the person, or to prevent a lunatic from doing an act which, if done by a sane person, would be a criminal offense, and he may detain such person until it may be reasonably presumed that he has changed his purpose; but when he interferes to prevent a fight, he should first notify his intention to prevent a breach of the peace. Thus, in extreme cases, he may break and enter the house of another to prevent him from murdering one within, who cries for assistance. (H's. G. & M., p. 471.)

(4) *What to be done with party arrested.*—When a person has arrested a felon or one suspected of a felony, he may deliver him to a constable, who may either carry him to jail or before a justice, or may himself take him to jail; but the safer course is to take him, as soon as conveniently may be, before a justice, to be examined, bailed, or committed to prison. When a private person has arrested another in the heat of an affray, he may lawfully detain him until the heat is over, and then deliver him to a constable. If a man be found attempting a felony in the night, any person may apprehend and detain him, until he can be carried before a justice. (H's. G. & M., p. 471.)

§ 2. Arrest by officers, without warrant.—By section 4789, "It shall be the duty of every conservator of the peace to arrest without a warrant for felonies committed in his presence, or upon a reasonable suspicion of felony, and for breaches of the peace and all misdemeanors of whatever character committed in his presence."

(1) *By a constable.*—A constable, besides his authority as a mere citizen to arrest without process, has some powers in that respect, by virtue of his office, that a private person does not possess. Thus, he is justified, and even enjoined, on pain of indictment, to arrest without warrant, upon a reasonable charge of a felony made to him by another, even though it should turn out that no felony was committed, and

upon such charge may, after proper demand and notice, break open the doors; but he that makes the charge is answerable, and should be present at the arrest. A constable, however, when acting merely upon his own suspicion, stands upon no higher grounds, in making arrests or breaking doors, than a private individual. But, upon view of a breach of the peace he may justify killing, if resisted in the arrest, which a private person cannot do; or, if an affray is made in a house, in his view or hearing, he may break open an outer door to suppress it; yet he cannot, any more than a private individual, justify an arrest, without a warrant, for a breach of the peace less than felony, after it is over. (H's. G. & M., pp. 471-2.)

(2) *By a town sergeant.*—A town sergeant, within the corporate limits and for one mile beyond, has the same power in making arrests as a constable within his district. (Code, § 3026.)

(3) *By a sheriff.*—Besides his usual duties as principal conservator of the peace in the county and in arresting for felony committed in his presence, the sheriff also has power to arrest, without a warrant, a person reasonably suspected of a capital offense, even though his guilt be not certain. And if he is assaulted in the execution of his duty, he may apprehend the offender, and keep him in prison for a reasonable time, to be carried before a justice, to be dealt with according to law. (H's. G. & M., p. 472.)

(4) *By a justice.*—If a felony or breach of the peace be committed in the presence of a justice, he may either arrest the offender himself, or by words command any person to apprehend him, and such command is a good warrant without writing; but if the felony or breach of the peace be done in his absence, then he must issue his warrant of arrest.

(5) *By a coroner.*—See *Coroner's Inquest*.

(6) *Formal warrants dispensed with in certain trials before justices in cities and towns.*—Where a person has been arrested for a misdemeanor by a police officer of a city or town while in the discharge of his duty as such, he may be tried without a warrant, unless the same is demanded. (Code, § 4992.)

§ 3. Warrant of arrest.—See “Arrest, Commitment, and Bail,” under *Justice of the Peace* (div. V.).

ARSON AND OTHER BURNINGS AND DESTRUCTIONS

- § 1. Definition of arson
- § 2. Burning dwelling-house, etc.
- § 3. Burning certain other public and private buildings
- § 4. Burning certain personal property, barn, stable, corn-house or tobacco-house
- § 5. Burning any building not elsewhere mentioned
- § 6. Burning bridge, dam, boat, vessel, etc.
- § 7. Malicious or negligent setting out fires
- § 8. Burning property to injure insurer
- § 9. Civil injuries caused by fires. See *Railroads and Railroad Companies*; and *Forts*
- § 10. Form of "description" in warrant or indictment

§ 1. **Definition of arson.**—Arson (which means burning) is the malicious burning of another's dwelling. The statute has made the burning of various other things unlawful.

§ 2. **Burning or destroying dwelling-house, etc.**—The statute forbids the malicious burning or (by the use of dynamite, nitro-glycerine or other explosives) destruction, in whole or in part, of another's dwelling-house (which includes out-houses that are a part thereof, and in which some one usually lodges at night), or any hotel, asylum, or other house in which persons usually dwell or lodge, or any railroad car, or any boat or vessel or river craft, in which persons usually dwell or lodge, or any jail or prison, or the malicious setting fire to anything, by the burning whereof such dwelling-house, &c., is burnt. If done in the night, the punishment is death, or penitentiary 5 to 20 years; but if the jury find no person was in the house, &c., at the time, the punishment is penitentiary from 5 to 20 years. If done in the day-time, the punishment is 3 to 10 years. And maliciously to burn or thus to destroy in the night a barn, stable, shed, or other building containing live stock at the time, is punishable by penitentiary from 3 to 10 years. (Code, §§ 4428-9.)

Any actual burning, however small, is sufficient, if some portion of the wood is consumed or even charred, and this is so even though the fire is afterwards put out or goes out itself. But mere scorching is not enough.

§ 3. **Burning certain other public and private buildings.** Maliciously to burn or thus to destroy, in whole or in part,

a meeting-house, court-house, town-house, college, academy, school-house, or other building, erected for public use (except an asylum, hotel or jail), or a banking-house, ware-house, store-house, manufactory, mill or other house of another, not usually occupied by persons lodging therein at night, when someone is therein, or maliciously to set fire to anything, by the burning whereof any such building is burnt, when someone is therein, is punishable by penitentiary 3 to 15 years; if no one is in the building at the time, 2 to 10 years. (Code, § 4430.)

§ 4. Burning certain personal property, barn, stable, corn-house, or tobacco-house.—Maliciously to burn any personal property, or a barn, stable, corn-house, or tobacco-house, is punishable by penitentiary, if the thing burnt is worth \$100, from 3 to 10 years; if of less value, 2 to 5 years. (Code, § 4431.)

§ 5. Burning or destroying any building not elsewhere mentioned.—Maliciously to burn or thus to destroy, in whole or in part, any building not punishable under any other section, is punishable by penitentiary 3 to 15 years; if no one is in the building at the time, and the building and property therein is of the value of \$100, 2 to 10 years; or if less value, 1 to 5 years. (Code, § 4432.)

§ 6. Burning or destroying bridge, dam, boat, vessel, etc. Maliciously to burn or destroy (by any means), in whole or part, a bridge, lock or dam, is punishable by penitentiary 1 to 10 years. (Code, § 4433.)

§ 7. Malicious or negligent setting out fires.—Maliciously to set fire to any woods, fence, grass, straw, or other thing capable of spreading fire on lands, is punishable by a fine of \$5 to \$500, and by jail 1 to 12 months, or by penitentiary 1 to 3 years. (Code, § 4434.)

Carelessly, negligently, or intentionally to set any woods or marshes on fire, or to set fire to any stubble, brush, straw, or inflammable substance, capable of spreading fire on lands, whereby the property of another is damaged or jeopardized, is punishable by a fine of \$10 to \$100. (Code, § 4435.)

“Maliciously” does not mean personal malice, but to do a wrongful act intentionally without just cause or excuse.

§ 8. Burning property to injure insurer.—Wilfully to

burn any building, or goods or chattels, which are insured, with intent to injure the insurer, is punishable by penitentiary 2 to 10 years. (Code, § 4436.)

§ 9. *Civil injuries caused by fires.*— See *Railroads and Railroad Companies*, and *Forts*.

§ 10. Form of "description" in warrant or indictment.—

NO. 1. BURNING OR DESTROYING A DWELLING-HOUSE, HOTEL, ETC., IN THE DAY OR NIGHT-TIME.

(Code, §§ 4428; 4432.)

DESCRIPTION:

"feloniously and maliciously, in the night (or *day*) time of that day, did burn (or *by the use of dynamite or other explosives, destroy*) the dwelling-house of him, the said A. B., (or *the hotel or other house in which persons usually dwell and lodge, or a railroad car, etc.*), situated in said county."

NO. 2. SETTING FIRE TO ANYTHING, WHEREBY A DWELLING-HOUSE OF ANOTHER IS BURNT.

(*Idem.*)

DESCRIPTION:

"feloniously and maliciously, in the night (or *day*) time of that day, did set fire to a certain outhouse (or other thing), situated in said county, by the burning whereof the dwelling-house of him, the said A. B., (or *hotel, or other house in which persons usually dwell and lodge, or a railroad car, etc.*), situated in said county, was then and there, in the night (or *day*) time, feloniously and maliciously burnt."

If a *boat, vessel, or river craft* be burnt under section 4428, substitute in the foregoing forms, "a certain boat (or *vessel or river craft*), in which persons usually dwell or lodge," in place of the phrase, "the dwelling-house of him, the said A. B., situated in said county."

If a *jail or prison* be burnt under section 4428, substitute in the foregoing forms, "the county jail and prison of the said county of -----," in place of the phrase, "the dwelling-house of him, the said A. B., situated in said county."

NO. 3. BURNING OR DESTROYING A MEETING-HOUSE OR OTHER PUBLIC HOUSE.

(Code, § 4430.)

DESCRIPTION:

"feloniously and maliciously did burn (or *by the use of dynamite or other explosive, destroy, or did set fire to a certain-----, naming*

what, *by the burning whereof then and there was burnt*), a certain meeting-house, situated in said county, called -----, which, with the property then therein contained, was of the value of-----dollars, and was erected for public use, to-wit: for the public worship of God."

The above description, with slight variation, will answer for any other *public* building named in section 4430.

No. 4. BURNING OR DESTROYING A BANKING-HOUSE, WAREHOUSE, STOREHOUSE, MANUFACTORY, OR MILL.

(*Idem.*)

DESCRIPTION:

"feloniously and maliciously did burn (or *by the use of dynamite* or other explosive, *destroy*, or *did set fire to a certain*-----, naming what, *by the burning whereof then and there was burnt*), a certain banking-house of the said A. B., situated in said county, which, with the property then therein contained, was of the value----- dollars, and was not then usually occupied by persons lodging therein at night."

The above description will answer for a warehouse, storehouse, manufactory, or mill, by inserting such house instead of the word "banking-house."

No. 5. BURNING A BARN, OR OTHER PERSONAL PROPERTY.

(Code, § 4431.)

DESCRIPTION:

"feloniously and maliciously did burn a certain stable belonging to the said A. B., situated in said county, which, with the property then therein contained, was of the value of ----- dollars."

In adapting the above form to any of the other things specifically named in section 4431, use the statutory name. As to other personal property, say: "certain personal property, to-wit: [here state what the property is]."

No. 6. BURNING A BRIDGE, LOCK, OR DAM, OR A SHIP, BOAT, VESSEL, OR RIVER CRAFT.

(Code, § 4433.)

DESCRIPTION:

"feloniously and maliciously did burn (or *by the use of dynamite* or other explosive, *destroy*) a certain bridge (or *lock* or *dam*) built across ----- river (or *creek*), and the property of [here state to whom the property belongs]."

No. 7. MALICIOUSLY SETTING OUT FIRE.

(Code, § 4434.)

DESCRIPTION:

"did unlawfully and maliciously set fire to a certain woods (or *fence, grass, straw, or other thing*) capable of spreading fire on the lands of the said A. B."

No. 8. NEGLIGENCELY SETTING OUT FIRE WHEREBY ANOTHER IS DAMAGED.

(Code, § 4435.)

DESCRIPTION:

"did carelessly and negligently (*or intentionally*) set on fire (or *set fire to*) a certain woods (or *marsh, stubble, brush, straw, or any inflammable substance, capable of spreading fire on the lands of the said A. B.*), whereby damage was done to the fences (or other property) of the said A. B."

No. 9. BURNING A BUILDING, OR GOODS AND CHATTELS, WITH INTENT TO INJURE THE INSURER.

(Code, §4436.)

DESCRIPTION:

"feloniously and maliciously did burn a certain dwelling-house (or other property) of him, the said A. B., situated in said county, with intent thereby to injure and defraud the _____ insurance company, the said dwelling-house (or other property) being insured against loss by damage by fire by the said _____ insurance company."

ASSAULT AND BATTERY

See Affray

§ 1. Assault and battery defined, and instances thereof

(1) Definition of assault and instances thereof

(a) An apparent attempt to assault

(b) There must be some movement towards violence to constitute assault

(c) False imprisonment is an assault

(2) Definition of battery, and instances thereof

§ 2. When assault or battery justified or excused

(1) In general

(2) As to right to defend one's property

- (3) As to right to defend one's person
- § 3. Punishment of assault and battery; compromise
- § 4. Damages for assault and battery
- § 4. Form of "description" in warrant or indictment

§ 1. Assault and battery defined, and instances thereof.

In common parlance, assault and battery is one thing, but in law assault is one thing and battery another—the one being an apparent attempt to hurt another, and the other the actual infliction of such hurt. Either is a civil injury for which damages may be recovered, and also a criminal offense.

(1) *Definition of assault and instances thereof.*—An assault is an apparent attempt, by violence, to do corporal hurt to another. Thus, striking at another with a cane, stick, fist, or other weapon, although the party striking misses his aim; holding up one's fist or drawing a sword or bayonet in a threatening manner; throwing a bottle or glass or other thing, with intent to wound or strike, but failing of its object; presenting a gun at a man and beginning to move towards him, or the mere presenting a gun within shooting distance; assuming a threatening attitude and hurrying towards him; or any other act indicating an intention to use violence against the person of another, completes the offense of assault, although no actual hurt be done, for an assault does not in law, as in common parlance, imply a blow. (H's. G. & M., p. 330.)

(a) *An apparent attempt to assault is sufficient.*—An attack apparently likely to hurt is as provocative of a breach of the peace as one actually capable of hurting. So apparent ability to hurt is sufficient. When the attitude is threatening and the effect is to terrify, the offense is complete, the party assaulted believing in the reality of the attack. Thus, leveling an unloaded gun at another in such a way as to terrify him, completes the offense; but not so if he knew the gun to be unloaded, nor need the assailant be within shooting or striking distance, if his attitude and position be such as would impress or alarm a person of ordinary reason. (H's. G. & M., p. 330.)

(b) *There must be some movement towards violence to constitute assault.*—Mere words cannot amount to an assault, but they may aggravate or explain equivocal acts of threatening, and make it an assault or not, according to the tenor

of the words. Thus, raising a whip and shaking it at another within reaching distance of him, and saying, "Were you not an old man I would knock you down," the assault is explained away by the words. But raising a weapon within striking distance and threatening to strike unless something is done, is an assault. "Menacing begins the breach of the peace, assault increases it, and battery accomplishes it". But it is difficult in practice to draw the precise line which separates violence menaced from violence begun, for until the execution of it is begun there can be no assault. But if there be a clear purpose of violence accompanied by an act, which if not stopped or diverted will result in personal injury, it is an assault, as riding after a person so as to compel him to run into a garden to avoid being beaten; as is also threats of violence by an armed assailant, apparently designing an attack. Nor does it matter that an attack is frustrated or intercepted by extrinsic means—e. g., by a third party intercepting the blow. (H's. G. & M., pp. 330-1.)

(c) *False imprisonment is an assault.*—False or unlawful imprisonment is an assault, as is any confinement or detention of the person of another, against his will and without sufficient authority, whether in jail, house, street, or other place. Proof of such imprisonment will sustain a charge of assault. (H's. G. & M., p. 331.)

(2) *Definition of battery, and instances thereof.*—Battery is the actual inflicting of corporal hurt on another—e. g., the least touching of another's person wilfully or in anger, whether by the party's own hand or by some means set in motion by him. Thus, spitting in another's face; pushing a third person against him, or jostling him out of the way; thrusting or pushing him or holding him by the arm; cutting his dress while he is wearing it, though without touching or intending to touch his person; to set a dog at him which bites him; fondling with a woman not his wife against her will; striking the dress of the person who is assailed, or the horse on which he is riding, or even, it is believed, the horse which he is driving; violently driving a cart or vehicle against that of another in anger, whether mediately or immediately, will constitute an assault and battery, for the law holds that the person of every man is sacred, and that

no other has a right to meddle with it in the slightest manner. Wounding is only an aggravated misdemeanor, in Virginia, by virtue of the common law, unless it amount to mayhem under the statute. (H's G. & M., p. 332.) See *Maiming or Mayhem*.

§ 2. When assault or battery justified or excused.—

(1) *In general*.—When the act is merely accidental and undesigned, here, of course, no offense is committed. And so it is when the occasion is lawful and no more force is used than is necessary for the purpose. Thus, it is no offense if the battery is with a view to defend one's self, or certain near relatives (e. g., wife, parent, child, or master); to arrest an offender; to prevent a felony; to expel intruders from depot, car, house, or lands; to repel violent trespass on property, or the like: provided, nor more force is used than the necessity of the case requires. (H's G. & M., p. 332.)

(2) *As to right to defend one's property*.—Where there is a mere trespass, either upon lands or goods, without actual violence, there must be a request to depart or desist, and then if he refuses, so much force may be used as is necessary to cause him to do so. But where the trespass is violent, no such request is required, and the owner may immediately lay hands upon him, and by opposing force by force, resist an attack upon him, or even rescue his goods, or expel the trespasser from his premises. But in general, unless there be considerable violence in the trespass, one should not, either in defense of his person or property, begin by striking the trespasser, but should gently lay his hands upon him in the first instance and not proceed with greater force than is made necessary by the resistance; and in all cases the force used must not be greater than is reasonably necessary to accomplish the lawful purpose. (H's G. & M., pp. 332-3.)

(3) *As to right to defend one's person*.—Not only may an assault be opposed by an assault, and a battery by a battery, but a mere assault may justify a battery; for one seriously threatened need not stay still till the other has actually struck him. Nor need the party flee from the aggressor, or, as it is styled, "retreat to the wall;" but he may stand his ground and repel force by force; yet he must re-

treat to the wall rather than take his assailant's life. If the battery be induced by a previous assault on the part of the person complaining, goes no further than to repeat such assault, it is a valid defense, which goes by the name of "son assault demesne". But this right of self-defense, founded in nature, recognized by all civilized nations, and sacredly cherished by every liberty-loving people, should be used only as a shield to protect and not as a sword to punish. If, in any case, whether of defense to person or property, or in prosecution of some lawful act, the battery be excessive and out of all proportion to the necessity of the case or the provocation received, it is not justified; and let it be remembered, no words of reproach, however grievous, is a sufficient provocation to justify an assault, yet such words may be used in evidence in mitigation of the offense or of the amount of damages, and may themselves be punished as abusive language. (H's G. & M., p. 333.) See *Abusive Language*.

(4) *As to chastisement of particular persons.*—If a parent, or one in the place of a parent in a reasonable manner chastise his child; or a schoolmaster, his scholar; or a jailer, his prisoner; or the like—no assault or battery is committed. (H's. G. & M., p. 333.)

§ 3. Punishment of assault and battery; compromise.—

An assault and battery or either is a common law misdemeanor in Virginia and is punishable by a fine not over \$500 or imprisonment not over 12 months, or both. (Code, § 4782.)

An assault and battery, before conviction therefor, may be compromised by a written acknowledgment of satisfaction before the judge or justice, except where the offense is by or upon an officer, or riotously, or with intent to commit a felony. (Code, §§ 4849-50.) See *Justice of the Peace*, div. VI. section 10. If the assault is with intent to maim, disfigure, disable, or kill, the offense is a felony under the statute as to maiming. See *Maiming or Mayhem*.

§ 4. Damages for assault and battery.—A person making an assault or an assault and battery upon another, is liable in damages to him for all the consequences which have ensued and those likely to ensue therefrom; and in estimating the damages the jury may consider the loss of time

and labor, his diminished capacity to work, the effect upon his health, expenses of medical service, his physical and mental suffering, and the indignity and insult to his feelings resulting from the time and manner of the attack; and in addition the jury may award what the lawyers call "exemplary", "vindictive", or "punitive", damages, which are damages given as a punishment to the defendant and to make him an example to deter him and others from similar outrages. It is generally understood that in order to recover punitive damages, there must be malice, but this does not mean actual or personal malice, but only legal malice, which is where an unlawful act is done wilfully, to the injury of another, without just cause or excuse, the law in such case presuming the act to be malicious. Punitive damages may always be allowed "whenever the assault is of a grievous or wanton nature, manifesting a wilful disregard of the rights of others". (See various Virginia decisions.)

The defendant cannot sue for such damages before a justice, for section 6015 of the Code does not give him jurisdiction for injuries to the person. The suit must be in court, which by recent act may now be by motion after 15 days' notice. (Code, § 6046.)

§ 5. Form of "description" in warrant or indictment.—

No. 1. COMMON ASSAULT AND BATTERY.

(Code, § 4782.)

DESCRIPTION:

"In and upon one E. F., an assault did make, and him, the said C. D., did then and there unlawfully beat, wound, and ill-treat, and other wrongs to him then and there did, to the great damage of the said E. F."

ASSESSMENT OF TAXES

See Cities and Towns; Erroneous Assessments; Licenses and License Taxes; Taxation and Tax Bill

- § 1. Assessment of lands and lots and their subsequent reassessment
- § 2. Assessments on persons and property

§ 1. Assessment of lands and lots and their subsequent re-assessment.—See Code, §§ 2233-51, and Acts 1920, pp. 36, 34, 68, amending §§ 2233, 2244, 2250, respectively.

§ 2. Assessments on persons and property.—See Code, §§ 2252-2357, and Acts 1918, amending § 2313; Acts 1918, p. 622, amending §§ 2316-26; Acts 1922, p.— (as to persons residing in State most of preceding 12 months). See Acts 1920, pp. 265, 402, amending § 2252; p. 89—§ 2274; p. 563—§ 2307; pp. 95-96—§§ 2332-6; p. 530—§ 2349, and Acts 1922, amending § 2337.

ASSIGNMENTS

- § 1. Definitions
- § 2. What may be assigned
- § 3. How an assignment may be made
- § 4. As to consideration for assignment
- § 5. Assignment by order, or "equitable assignment"
- § 6. Assignment of secured debts or liens
- § 7. How assignee may sue debtor
- § 8. Off-sets against assignee
- § 9. Remedy of assignee against assignor

§ 1. Definitions.—An assignment is the transfer of a bond, note, writing, or other right of action by the owner, called the "assignor", to another, called the "assignee"; and in the case of a debt, the third party is the "debtor". In a broader sense, assignment includes the transfer of property, real or personal, in possession, or of any estate or right therein, the party taking sometimes being called "assigns" or "assignee". See *Assignment for Benefit of Creditors; bill of Sale; Conveyance; Deeds of Trust*.

§ 2. What may be assigned.—The owner may assign "any bond, note, writing, or other chose in action". (Code, § 5768.) A "chose in action" is a thing in action, or a right of action, i. e., a right to bring an action or suit,—e. g., an account, bond, note, or other debt, or right to damages for

breach of contract, or for any injury to property, real or personal, or any other right connected therewith, or even a right to a thing not yet in existence, as future wages, etc., provided there is an existing contract for such thing; but a chose in action does not include damages for personal injuries, such as assault and battery, false imprisonment, malicious prosecution, slander, libel, etc.; nor a contract for personal services founded on personal trust or confidence, unless the debtor consents thereto. Assignments have been held valid in Virginia in the following particular cases: A claim for damages for loss by fire, a life policy, a right of action against a railroad company for injury to goods in transit, a right to claim a mechanic's lien, the lien itself, a judgment, and other liens. (3 Min. Inst. 432-4.)

As to a life policy, the statute provides that a policy "taken out by the insured himself, or by a person having an insurable interest in his life, in good faith, and not for the purpose of assignment, may be lawfully assigned to anyone, for a valuable consideration, as any other chose in action, without regard to whether the assignee has an insurable interest in the life insured or not, and the assignee may recover upon it whatever the insured might have recovered but for such assignment". (Code, § 5767.)

§ 3. How an assignment may be made.— An assignment may be made either by words endorsed on the writing, or by a separate writing, or even verbally in some cases by mere transfer. Bonds and notes may be assigned by mere transfer, without endorsement; or by the owner endorsing his name. But delivery is necessary to an assignment, whether it be a gift or for a valuable consideration; but where the writing is not in the custody nor under the control of the assignor, the assignment may be made by the delivery of a separate writing of assignment. Recording an assignment will not take the place of delivery, for the statute (Code, §§ 5142, 5194) as to recording gifts or sales of "goods and chattels" does not apply to "chooses in action," as held by numerous Virginia decisions. The mere possession of bonds and notes makes a *prima facie* case of ownership, yet the owner should hesitate to pay the holder without some further evidence of ownership.

A note, etc., may be assigned as follows:

"For value received, I hereby assign the within note (or bond, etc.) to A. E., this _____ day of _____, 192____ A. R."

If the assignment be "without recourse", add these words after "A. E."

In case of some other contract, say "For value received, I hereby sell, assign, transfer and set over to A. E., all my right, title, and interest in the within contract. This _____ day of _____, 192____ A. R."

A negotiable paper is transferred or negotiated, if payable to bearer, by mere delivery; if payable to order, by endorsement and delivery. The endorsement may be, "Pay to P. E." (or "to order of P. E."), and then signed, and P. E.'s signature is necessary before it can be further negotiated; or, it may be by endorsing one's signature, which is called a blank endorsement, and operates to make the paper payable to bearer. (Code, §§ 5592-6). (3 Min. Inst. 433-4.)

§ 4. As to consideration for assignment.—No consideration is necessary for an assignment, as between the parties; but the statute provides that a gift, assignment, or transfer which is not for a valuable consideration, or which is in consideration of marriage, is void as to existing creditors, but not as to subsequent creditors or purchasers. (Code, § 5185.)

§ 5. Assignment by order, or "equitable assignment".—An order given by one person to another, for a valuable consideration, on a particular debt or fund, is an equitable assignment of so much of the debt or fund as the order calls for; and now in Virginia (Code, § 5768), the assignee may sue the debtor at law for the amount; and this is true even though the third party does not accept the order. But notice to the debtor is necessary to a perfect title, for until then the assignment is subject to all off-sets which the debtor may have against the assignor. (See various Virginia decisions.) But a bill of exchange is not an assignment until accepted, nor is a check, until accepted or certified. (Code, §§ 5689, 5751.)

§ 6. Assignment of secured debts or liens.—The assignment of a bond, note, or other debt carries with it any deed of trust, mortgage, vendor's lien, or other lien securing the debt, without a formal assignment or delivery of such

security or lien. And where there are several notes or bonds thus secured, which are assigned at different times, and the property is not sufficient to pay all, the several assignees, unless otherwise expressly provided, are to be preferred and paid according to the priority of their assignments, and this without reference to the maturity of the debts. (4 Min. Inst. 433-4.)

To make sure of the benefit of such lien, in case the lien should be fraudulently marked satisfied by the assignor, or in any other case, notice to subsequent purchasers or any one acquiring a subsequent lien, may be given by the assignee, transferee, or endorsee, by his making a signed statement of the assignment, attested by the clerk, on the margin of the deed book where the lien is recorded. (Code, § 6457.)

§ 7. How assignee may sue debtor.— “The assignee or beneficial owner of any bond, note, writing or other chose in action”, may sue either in his own name or in the name of his assignor, either at law, or in equity, where there is not an adequate remedy at law. (Code, §§ 5144, 5768, 5770.)

§ 8. Off-sets against assignee.— An assignee stands in the shoes of his assignor, and takes subject to all the off-sets or discounts, legal or equitable, of the debtor against the assignor, until notice of the assignment, and also all “discounts against any intermediate assignor or transferer, the right to which was acquired on the faith of the assignment or transfer to him and before the defendant had notice of the assignment by such assignor or transferer to another”. (Code, § 5768.) In other words, the assignee is in not better condition than the assignor was at the time the debtor had notice of the assignment but if the debtor induce the assignee to take the debt without notice of any off-set, he is estopped from making such defense; and this principal of estoppel will apply in all cases where justice requires it. So where one lends his credit to another in the form of a note or bond, to be sold to raise funds, he cannot set up against the assignee any off-set or private agreement unknown to him. And where after notice of the assignment, the debtor promises the assignee to pay the debt, or by his conduct induces him to believe that he will, under such circumstances as that a retraction of the promise would operate as a fraud upon the assignee, the

debtor is thereby estopped from afterwards setting up any defense he may have had against the assignor. But mere silence of the debtor, when notified of the assignment, will not operate as such estoppel. (3 Min. Inst. 435-6.)

The notice by an assignee to a debtor, of an assignment, may be in the following form:

"Mr. D. D.:

Take notice that A. R. has assigned and transferred to me a bond (or note, etc.), executed by you to him on the-----day of -----, 192--, for the sum of-----dollars, payable-----months (or years) after date; and to not make any payments on the said bond (or note) to A. R., or to any one for him, but pay the same to me, the owner of the said bond (or note). This----day of-----, 192--

A. E."

§ 9. Remedy of assignee against assignor.—The assignee, if unable, after due diligence, to recover of the debtor, may, in the absence of any stipulation to the contrary, as, where the assignment is "without recourse", sue the assignor, or any previous assignor, however remote, reserving to such remote assignor, however, the same defense he might have had against his immediate assignee; but a joint action must be against joint assignors. (Code, § 5769.) The recovery is measured by the consideration paid by the assignee, and the cost of his suit, if any, against the debtor; and if there were no consideration, no recovery can be had. Prima facie, the consideration is the amount of the bond, note, etc. Before suing the assignor, the assignee must use due diligence to make the money out of the debtor, which, in general, means that he must prosecute a suit to judgment and execution without effect against the debtor; but this is not necessary where the debtor is insolvent or a suit would otherwise be unavailing; or where the note is a forgery and the assignor has received the money from the assignee; or where the assignor practiced a fraud upon the assignee. (3 Min. 436-8.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS

- § 1. Definition
- § 2. Formal requisites
- § 3. Creditors may be preferred
- § 4. Release in full
- § 5. As to fraudulent assignments
- § 6. Useful forms of "assignments"

§ 1. Definition.—An assignment for the benefit of creditors is a voluntary transfer by a debtor of all or a part of his property to an assignee, or trustee, in trust to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor. And such assignment may be made by a corporation or partnership, as well as by any individual debtor. If the assignment is of a part of the debtor's estate to secure certain debts not due, it is nothing more than the usual deed of trust.

§ 2. Formal requisites.—An assignment of goods and chattels, including bonds, notes, etc., may be by a writing not under seal, but where the assignment also embraces real estate it must be by deed, or writing under seal, which would be the better form of an assignment in any case. In the case of personal property, the usual form is "assign, transfer, and set over", but in any case, especially where real estate is embraced, the words "assign, grant, and convey" is sufficient, or even the word "grant" itself.

§ 3. Creditors may be preferred.—In Virginia, a debtor in failing circumstances may prefer one creditor or set of creditors to another, and the statute as to fraudulent conveyances does not apply. But the law is jealous of making relatives preferred creditors. A debt barred by limitation may be preferred. (See various Virginia decisions.)

§ 4. Release in full.—Where the deed conveys all, or substantially all, of the debtor's estate, not exempt by law, it may provide that no creditor shall take any benefit under the deed, who does not, within a stated time, release the debtor in full, upon payment of part. But the debtor should give the creditors a reasonable time to accept or reject such provision of the deed. One, three, and four months have been

held sufficient time in different cases. (See various Virginia decisions.)

§ 5. As to fraudulent assignments.—An assignment is not valid, if with intent to delay, hinder, or defraud creditors, purchasers, or other persons. See *Fraudulent and Voluntary Conveyances*.

§ 6. Useful forms of "assignments".—

No. 1. GENERAL DEED OF ASSIGNMENT.

(Gregory's Forms, No. 522.)

This deed, made this-----day of-----, 192___, between A. R., party of the first part, and T. T., trustee, chosen for the purposes hereinafter named, party of the second part:

Witnesseth, that the said party of the first part doth assign, grant and convey unto the said party of the second part, with general warranty, all and singular the following property (except such as is exempt by chapter 274, of the Code of Virginia, known as the "Homestead" and "Poor Debtors" law), to-wit: [here designate and describe the property], and all other personal property and choses in action of every kind and description whatsoever, and the following real estate [here describe it], and all the real estate wheresoever situated, belonging to the said party of the first part, whether in law or equity, it being the object of this deed to embrace and include all and every part of the real estate standing in the name of the said party of the first part or to which he is entitled, at law or in equity, wheresoever situated:

In trust to secure the costs and expenses of this trust, including commissions to the said trustee of-----per centum on the amount of sales, or on the moneys that shall come to the hands of the said trustee from sales or otherwise, and the fees of counsel in and about the preparation and execution of this deed, if they shall remain unpaid at its delivery; and after the payment thereof, to secure the following creditors: [Here give the names of the creditors, and if some are preferred before others, state the order of their preference.]

And the said trustee, for the purpose of executing this trust, shall at once take charge of all the property and effects hereby conveyed, and make an inventory thereof, and proceed to collect the choses in action and all evidences of indebtedness, and to convert the real and personal property into cash as soon as possible, and he may make sale of the real and personal estate hereby conveyed, at public auction or private sale, at such time or times, place or places, and after such notice as to him shall seem best. And upon the conversion of the property hereby conveyed into money, the trustee shall distribute the same pro rata to and among the creditors above named with all diligence. And the trustee is authorized to employ all such agents, attorneys and laborers as may be necessary for the preservation, protection, handling, shipping, or cultivation of the property hereby con-

vayed in such manner as shall be for the interest of all concerned, and do all things necessary for the cultivation, saving and shipping the crops now growing or which may be planted on any of the lands hereby conveyed for the present year, and, in case any of the said country lands shall remain unsold during the present year, to make such arrangements or contracts for their cultivation until sold, as shall seem best, the charges, costs and expenses of all which shall be charged as a part of the expenses of this trust.

Given under my hand and seal, the day and year first above written.

A. B. (SEAL.)

No. 2. ANOTHER FORM OF ASSIGNMENT IN TRUST FOR CREDITORS.
(Sand's Forms, 34.)

This deed, made this ----- day of -----, 192--, between J. H., of the city of -----, party of the first part, M. M., of the said city, party of the second part, and the creditors of the said J. R., of the third part: Whereas, the said J. R. is embarrassed in his pecuniary affairs, and desires to secure his creditors the payment of their respective claims against him, as far as his property will admit of, and with that object in view, he has determined to convey his said property in trust, as hereinafter contained: Now, therefore, this deed witnesseth, that the said J. R., in consideration of the premises and of the sum of ----- dollars to him in hand paid by the said M. M., the receipt whereof is hereby acknowledged, hath granted and conveyed, and doth hereby grant and convey, unto the said M. M., all his the said J. R.'s property and rights of property, real, personal and mixed, of every kind and description, the same being enumerated and described, as far as remembered, as follows: [here insert list]. To have and to hold the said property and rights of property aforesaid, unto the said M. M., his heirs and assigns forever. *In trust* to collect, sue for, demand, receive and recover all such sum or sums of money as may be due and owing to the said J. R., and to sell and dispose of all the real and personal property embraced in said list; and from the proceeds of such sales and collections aforesaid, after paying all reasonable and proper costs, charges and expenses, including a reasonable commission to himself, the said trustee, M. M., shall pay to each and all of the creditors of the said J. R., the full sum that may be due and owing to the said creditors, a full and complete list of which creditors is, so far as now remembered, is as follows: [here insert list of creditors]. Should any creditor or creditors of the said J. R. not be embraced in said list, his or their rights hereunder are not to be prejudiced thereby, and if such sales and collections shall not be sufficient fully and entirely to pay off and satisfy each and all of the said creditors of the said J. R., then the said trustee shall pay them *pro rata*, in proportion to the amount due and owing, or to become due and owing to each.

In witness whereof, the said parties of the first and second parts

have hereunto set their hands and affixed their seals the day and year first herein written as the date hereof.

_____ (SEAL.)

_____ (SEAL.)

No. 3. ASSIGNMENT, PREFERRED CREDITORS.

(Sands' Forms, 35.)

This deed, made this ----- day of -----, 192--, between J. L. and James D., partners under the firm and style of L. & Co., parties of the first part, M. M., party of the second part, and the several creditors of the said L. & Co., enumerated and specified in the schedule hereunto annexed parties of the third part: whereas the said L. & Co. are justly indebted in sundry and considerable sums of money, and have become unable punctually to pay and discharge the same, and are desirous of conveying their property and rights of property, as hereinafter mentioned: Now, therefore, this deed witnesseth, that the said J. L. and James D., partners under the firm and style of L. and C., in consideration of the premises, and of the sum of ----- dollars to them in hand paid, the receipt whereof is hereby acknowledged, have granted, sold and conveyed, and do by these presents grant, sell and convey unto the said M. M., all and singular the goods, chattels, rights and credits of the said L. & Co., and all other property of every kind and description belonging to them, or to either of them, a list of which property, and of such rights and credits, is hereto annexed marked Schedule A., and is hereby specially referred to. To have and to hold such goods, chattels, and rights and credits and other property of every kind and description as aforesaid, unto him, the said M. M., his heirs and assigns forever. *In trust*, nevertheless, and for the following uses and purposes, to-wit: (1) To pay and satisfy from the same the several and respective debts, notes, bonds and obligations, and sums of money due from the said parties of the first part, to the several persons mentioned in the class of creditors denominated and described as "First-class creditors," of the said parties of the first part, in the Schedule B., hereunto annexed (if not sufficient, then *pro rata* among them), and after fully paying and satisfying such first-class creditors as aforesaid, their whole debts and claims as aforesaid, against the said parties of the first part, then, (2) to pay and satisfy from the said rights, chattels and property hereby conveyed, the several and respective debts, notes, bonds and obligations and sums of money due or to become due from the said parties of the first part, to the several persons mentioned in the class of creditors denominated and described as "Second-class creditors" of the said parties of the first part in the said Schedule B (if not sufficient, then *pro rata* among them); and after fully paying and satisfying such second-class creditors as aforesaid, their whole debts and claims as aforesaid, against the said parties of the first part; then, (3) to pay and satisfy, from the said rights, chattels and property hereby conveyed, the several and respective debts, notes, bonds and obligations, and sums of money

due or to become due from the said parties of the first part to the several parties mentioned in the class of creditors denominated and described as "third-class creditors" of the said parties of the first part, in said Schedule B, and if not sufficient, then *pro rata* among them.

In executing this trust, and to carry out the purposes thereof, the said trustee is to proceed to collect, himself, or by agents and attorneys appointed by himself, all and singular the notes, bonds, bills and evidences of debt, and to make sale of the said property of every kind mentioned in Schedule A; and is to pay all the just and reasonable expenses, costs, commissions and charges attending the collection and management, or sale and disposition of the said notes, bills, evidences of debt, property and rights of property; these costs and charges and commissions to be borne and paid before any distribution of such collection or of the proceeds of said trust property is to be made to any class of creditors hereby secured.

In witness whereof, the parties hereto have hereunto set their hands and seals on this ----- day of -----, 192---

J. L. (SEAL.)

JAMES D. (SEAL.)

SCHEDULE A—Referred to in annexed deed.

(Here describe the claims, property &c., conveyed.)

J. L.

JAMES D.

SCHEDULE B—Referred to in annexed deed.

"First-class creditors" of J. L. & Co.

M. N., negotiable note dated ----- day of -----, for \$6,200.00

P. Q., bond dated -----, for 3,000.00

"Second-class creditors" of J. L. & Co.

R. B. C., a note dated ----- day of -----, due on the ----- day of -----, for 1,120.00

L. J. M., single bill dated ----- day of -----, 350.00

"Third-class creditors" of J. L. & Co.

A. B., open account, 25.00

C. D., note, 100.00

E. F., bond for 420.00

&c., &c.

And all other creditors of the said J. L. & Co., if any, whose names would be inserted here, in this third class, if remembered.

J. L.

JAMES D.

ATTACHMENTS

(See "Burks' Pleading and Practice" (new ed.), same title.)

- § 1. Attachments triable by a justice.
- § 2. Attachments issued by a justice or clerk and returnable to court.

§ 1. **Attachments triable by a justice.**—For a full treatment with forms, see div. I of "Attachments", under *Justice of the Peace*, div. II.

§ 2. **Attachments issued by a justice or clerk and returnable to court.**—For this subject, with forms, see div. II of "Attachments", under *Justice of the Peace*, div. II.

ATTEMPTS TO COMMIT OFFENSES

See *Abortion and Miscarriage; Animals, Fowls, etc., Assault and Battery*

- § 1. Definition.
- § 2. Punishment.
- § 3. Attempts to poison; how punished.
- § 4. Form of "description" in warrant and indictment.

§ 1. **Definition.**—If a person "attempts to commit an offense, and in such attempt does any act towards its commission", he is punishable even though the offense be not committed; it is necessary to constitute an attempt that there should be, (1) an intent, and (2) a direct ineffectual act towards the commission of the offense, and the act must go far enough towards the accomplishment of the desired result to amount to the commencement of the consummation or completion, but the act need not be the last act prior to the completion of the offense. A mere preparation to commit an offense, however, is not an attempt. (6 Grat. 675, 706; 8 Grat. 695.)

§ 2. **Punishment.**—(1) If the offense be punishable with death, the attempt is punishable by penitentiary from 2 to

5 years, except an attempt to commit rape is punishable with death, or by penitentiary from 3 to 18 years;

(2) In case of a penitentiary offense, the punishment is jail from 6 to 12 months;

(3) In case of misdemeanor, jail not over 6 months or fine not over \$100; except

(4) In case of grand or petit larceny, when the attempt is punishable by jail from 15 days to 6 months or fine. (Code, § 4767.)

§ 3. Attempts to poison; how punished.— “If any person administer or attempt to administer any poison or destructive thing in food, drink, medicine, or otherwise, or poison any spring, well, reservoir of water with intent to kill or injure another person he shall be confined in the penitentiary not less than three nor more than 18 years.” (Code, § 4400.)

By this statute, not only to administer poison, &c., with intent to kill or injure, but even a mere attempt to do so with such intent, is a felony, punishable with equal severity in both cases; for the gist of the crime in either case, consists of the cool and deliberate intent to kill or injure, indicated by the means used and accompanied by some acts toward the execution of the design; and not in the degree of proximity to success. The present English statute upon this subject prescribes death against “whosoever shall administer, or cause to be taken by any person, any poison or other destructive thing,” and only transportation against one who shall attempt to administer to any person any poison or other destructive thing;” and under this statute it has been held, that to constitute the offense of administering poison, some portion of it must be taken by or applied to the person to whom it is administered, and that merely giving it, if no part was taken or applied, was not sufficient. So that in indicting under our Virginia statute, it is proper to count for administering and for attempting to administer, as upon the authority just cited a count for administering only would not be sustained by proof of an attempt to administer it. The justice should be satisfied that the drug or substance mingled with the food, etc., or put in the well, etc., was a poison or some destructive thing, and that it was so mingled or put with intent to kill or injure; but if he should mistake one

kind of poison for another, it will not vitiate the proceedings against the offender, for even upon an indictment it will be sufficient to prove that a similar kind was used. (H's. G. & M., pp. 119-20.)

§ 4. Form of "description" in warrant and indictment.—

No. 1. ADMINISTERING OR ATTEMPTING TO ADMINISTER POISON WITH INTENT TO INJURE OR TO KILL A PERSON.

(Code, § 4400.)

DESCRIPTION IN WARRANT:

"feloniously did administer (or *attempt to administer*) unto one E. F. a certain poison called arsenic (or other poison) with intent to injure and kill the said E. F."

DESCRIPTION IN INDICTMENT:

"did feloniously and maliciously administer to one E. F., a large quantity of a certain deadly poison, called arsenic, to-wit, two drachms of the said arsenic, with intent then and there, thereby feloniously and maliciously to injure and kill him, the said E. F."

[Add count for attempting to administer poison.]

No. 2. MINGLING POISON WITH FOOD, DRINK OR MEDICINE, WITH INTENT TO INJURE OR KILL A PERSON

(*Idem.*)

DESCRIPTION IN WARRANT:

"feloniously did mingle a certain poison called arsenic (or other poison) with certain food (or *drink* or *medicine*, as the case may be), in order that the same might be taken by one E. F., and other persons, with intent to injure and kill the said E. F. and other persons."

DESCRIPTION IN INDICTMENT:

"did feloniously and maliciously attempt to administer to one E. F., a quantity of a certain poison called arsenic, by then and there mingling the said poison called arsenic with a certain food (or *drink* or *medicine*, as the case may be), in order that the same might be then and there taken by the said E. F., and divers other persons, with intent thereby feloniously and maliciously to injure and kill the said E. F., and the said other persons."

ATTORNEY AND CLIENT

- § 1. Definition of attorney at law
- § 2. License to practice law
- § 3. Non-resident attorneys
- § 4. Qualifying in court
- § 5. Practicing without being licensed or qualified
- § 6. When license revoked or suspended
- § 7. What officers, etc., forbidden to practice law
- § 8. Authority of attorney
- § 9. Liability of attorney to client
- § 10. Attorney's fees
- § 11. Attorney's lien
- § 12. Privileged communications
- § 13. Practice before legislature or its committee

§ 1. **Definition of attorney at law.**—Attorneys are two kinds, attorney at law and attorney in fact, the latter being one appointed by a special letter or power of attorney to act for another (See *Power of Attorney*). An attorney at law, or lawyer, or counsel, is one who is licensed and admitted to practice law, i. e., to act in the turn or place of another to attend to his legal business, whether in or out of court, for compensation. (4 Min. Inst. 195-6.)

§ 2. **License to practice law.**—Applicants (male or female) to practice law, first obtain a certificate of a court or the judge, that he or she is a person of honest demeanor, over 21 years of age, and has resided in the State the preceding six months, or if a law student in one of our law schools connected with a university or college, a certificate by any two professors therein that he is a person of honest demeanor over 21, and within the 3 preceding years has studied law at said school for two collegiate years.

The application for such certificate is in writing, addressed to the court, specifying the day the motion therefor is to be made, accompanied by the written recommendation of two lawyers of the circuit who practice in the Supreme Court, speaking of their personal knowledge, that he or she is of good moral character and a proper person to be licensed to practice law. Such application and recommendation must be filed with the clerk ten days before the motion is to be made, and copy thereof is forthwith delivered by the clerk to the judge. A person between 19 and 21 years of age, who has

studied law two years in such a law school or in the office of a practicing attorney of the State, may obtain a certificate in like manner as above, but stating in addition the foregoing facts that he is over 19, and when he or she will be 21 years old. But the license is not issued until he is 21.

The bar examination is held at least two each year, for the present at Richmond at the Capitol, on the 2nd Tuesday in December, and at Roanoke, the 4th Tuesday in June, by the Board of Law Examiners appointed by the Supreme Court.

Five days before the examination, the applicant must file with the Secretary of the Board, Richmond, Va., a certified copy of his application, recommendations, and court certificate, accompanied by a fee of \$10.00, in certified check, money order, or cash (which covers all costs of examination, including license). The papers filed must show upon their face the court order granting the certificate was made on the day named in the application, or that the application was docketed that day. All requirements must be strictly complied with.

Any person failing to pass an examination, or who has passed on only a part of the schedule of examinations, may again apply in writing, addressed to the secretary of the board, showing that he has diligently pursued the study of the law since the former examination, stating the sections of the examination on which he has already passed, and enclosing the fee of \$15.00.

An applicant failing to appear, forfeits his or her fee, but may, stand any subsequent examination, within two years from the date of his or her original application, on the original papers, and without additional charge, provided he or she gives a satisfactory reason to the Board for the failure to appear, and pay the difference in case he has been increased.

Applicants must provide themselves, with fountain pens or indelible pencils for the examination. Applicants may also be examined orally. In grading papers the applicant's general qualifications will be considered. The examination covers the following subjects:

The examination shall last two days, and each day shall be divided into two sections. The topics for examination shall

be as named below, and shall be distributed among the examination sections as follows (but the board does not consider itself committed to asking questions on all the subjects named under any section):

FIRST DAY.

Sec. 1. Legal Ethics, see "Annual Reports of Bar Association" or "Hurst's Index and Directory of Virginia Law", Evidence, Criminal Law; Pleading and Practice (at common law, in equity, criminal and statutory).

Sec. 2. Agency; Contracts; Domestic Relations; Negotiable Paper; Sales; Torts.

SECOND DAY.

Sec. 3. Conflict of Laws; Equity Jurisprudence; Partnership; Real Property; Wills and Administration.

Sec. 4. Bailments; Carriers; Constitutional Law; Corporation Commission; Corporations; Insurance.

(Questions on the Virginia Code and the general principles of the common law may be asked under any section.)

Any candidate making the passing mark (averaging the four groups together) shall be passed upon the examination as a whole; and one not passing the examination as a whole, but passing on one or more of above groups, shall be entitled to credit on the group or groups so passed on future examinations.

The applicant must sign this pledge: "I hereby certify that I will neither receive nor give aid or assistance in any manner during this examination". If he or she violates the pledge, he or she is denied a recommendation for admission to the Bar. (Code, § 3408-22, as amended by Acts 1922, 17 Va. Law Reg. 93-95.)

For the various bar examination questions for the past several years, see the following volumes of the Virginia Law Register: 4-270, 405, 694, 707; 6-198, 431, 717, 788; 9-836; 10-947; 11-346, 853; 12-265, 841; 13-328, 650; 14-231, 651; 15-246, 647; 16-232, 630; 17-329, 651; 18-310, 635, 793; etc.

The Supreme Court may grant a certificate without examination to any professor in any of the law schools of this State, who has taught therein for three years (Code, §3409, as amended by Acts 1922.)

In addition, each attorney (even of a firm) must (under

a penalty of \$50 to \$100 for each offense) get a revenue license, and pay the tax, which is \$15.00 per annum for attorneys who have been licensed less than 5 years or who make less than \$500 per annum; in other cases the tax is \$25.00 (Code, §§ 2368, 2373; 2 Code 1919, p. 3145, §§ 115-16).

No further license is required for acting as a broker in negotiating loans, see *Brokers*, section 7, (2).

§ 3. Non-resident attorneys.— These may do occasional practice in association with local practicing attorneys, without examination or license; but if they desire to locate in the State, and have practiced before the Supreme Court of another state or territory or the District of Columbia for three years, the Supreme Court of Appeals may grant them a certificate to practice here. (Code, § 3408, as amended by Acts 1922.)

§ 4. Qualifying in court.— Every attorney must also produce before each court where he practices satisfactory evidence of his being licensed or authorized, and take an oath that he will honestly demean himself in the practice of the law, and to the best of his ability execute his office as attorney at law; and also, when a resident, take the oath of fidelity to the Commonwealth. (Code, § 3421, as amended by Acts 1922.)

§ 5. Practicing without being licensed or qualified.— The penalty is \$10 to \$50, but does not apply to one instituting a suit, who qualifies at the next term.

See *Licenses and License Taxes*.

§ 6. When license revoked or suspended.— The Board of Examiners may, for good cause, revoke a license any time before the person has qualified (Code, § 3420.) If convicted of a felony or of any malpractice or of any corrupt, unprofessional conduct, the court may revoke or suspend his license, as to practice in that court. (Code, § 3423.) For the procedure to suspend or annul an attorney's license for practice in any court, for malpractice (which includes failure without sufficient cause, within a reasonable time after demand, to pay to the person entitled, money, security, or other property which has come to his hands), see Code, § 3424.

The following are instances of malpractice: appearing in cases without being employed; continuing cases through deceitful methods; dealing unfairly with clients; colluding

with them to deceive the court; demanding fees for pretending service not rendered; failure to pay money collected or to deliver securities taken; stirring up suits, etc.

The court may also require of an attorney security for his good behavior, or may fine him for contempt (Code, § 3425). See *Contempt*.

He may also be disbarred upon conviction for advertising as a divorce attorney (Code, § 5116).

§ 7. What officers, etc., forbidden to practice law.— Clerks, sheriffs, sergeants, and other deputies, and persons interested in the profits of their office, cannot, under penalty of \$100, practice in other courts (Code, § 3426). A judge is not permitted to practice law anywhere in the State (Code, § 5975).

§ 8. Authority of attorney.— When an attorney has been appointed or employed, his authority continues, unless revoked, until judgment, and for a year and a day afterwards, in order to sue out execution, and for a longer time, if the power to sue out execution be kept alive. He may bind his client by assenting to an arbitration, or by extending the time for the arbitrators to decide. He may remit damages, waive any advantage in the pleading, release one of the defendants and take judgment against the others, receipt for money recovered; but he cannot take bonds, notes, or property in satisfaction of a debt. An attorney's authority may be revoked at the pleasure of the client, but death does not, in Virginia, revoke his authority. (4 Min. Inst. 207-9.)

§ 9. Liability of attorney to client.— If he, "by his negligence or improper conduct, lose any debt or other money, he shall be charged with the principal of what is so lost and interest thereon, in like manner as if he had received such principal." (Code, § 5406). And in other cases, an attorney is liable to his client for any damage sustained by him by his negligence (Code, § 3427). Indeed, he is liable for gross ignorance, as for failure to observe the rules of practice of the court, for failure to file a declaration, plea, etc., and for the mismanagement of a case; but he is not liable for errors in judgment upon points of new occurrence, or of nice doubtful construction. The measure of damages for negligence, is the loss sustained by reason thereof. (4 Min. Inst. 210-11.)

If an attorney fails on demand to pay over money collected, it may be recovered by a warrant before a justice, or by suit or motion in court, depending upon the amount, and damages in lieu of interest, not exceeding 15 per cent. per annum, may be awarded against him; and he cannot claim the homestead exemption against the debt. (Code, §§ 3427, 6531 (3).)

§ 10. Attorney's fees.—An attorney is entitled not only to the fee that may be taxed in the case, but such other fee as may be agreed upon between him and his client, or if there be no agreement, such fee as his services are reasonably worth. (Code, § 3428.) If an attorney dies before he completes the business, his executor or administrator is not required to refund the fee paid or any part thereof.

Where a party recovers cost, the clerk taxes an attorney's fee as follows, which belong to him and not to his client: in case of unlawful entry or detainer and criminal case, or ejectment, \$5.00; in other cases in a court of law, (except a judgment be default on a forthcoming bond), \$2.50; in a chancery case, \$5.00, but \$15.00 if the matter in controversy is over \$100; in the court of appeals, \$20. But the fee of only one attorney can be taxed. (Code, § 3533-4.) The court may assign an attorney to represent a poor person without any fee (Code, § 3517.)

In some cases the court allows a fee out of money or property under its control, but not unless the claim therefor be stated in the bill, petition, or other proceeding, or unless the parties in interest be notified in writing that an application will be made to the court for such allowance. (Code, § 3430.)

An attorney, without further license, may charge brokerage, for negotiating loans—see *Brokers*, section 7. (2).

§ 11. Attorney's lien.—An attorney may withhold papers belonging to his client until his fees are paid. Also, he has a lien on funds in his hands, or in the hands of the opposite party or of the officer, who must not pay to the client after notice of his lien for fee.

In damage suits, an attorney has a lien upon the cause of action as security for his fees; and if written notice thereof be given to the opposite party, his attorney, or agent, a settlement or adjustment made by the defendant is void as

against his lien, but may be used as proof of liability. (Code, § 3429.)

§ 12. Privileged communications.—An attorney will not be permitted or compelled, without the consent of his client, to reveal any secrets entrusted to him in his professional capacity, even though he is not employed; and the same rule applies to his stenographer or clerk. (4 Min. Inst. 210.)

§ 13. Practice before legislature or its committee.—The statute as to lobbying does not prevent attorneys from being employed to appear before the legislature or its committee. (Code, §§ 4499, 4500.)

AUCTION AND AUCTIONEER

- § 1. Definitions
- § 2. Whose agent is auctioneer
- § 3. Auctioneer's authority
- § 4. By-bidding
- § 5. When buyer need not take property
- § 6. Resale at risk of buyer
- § 7. Classes of auctioneers, and licenses
 - (1) General auctioneers
 - (2) Real estate auctioneer
 - (3) Tobacco auctioneer
- § 8. Who may sell at auction without a license
- § 9. Common crier, and his license

§ 1. **Definition.**—An auction is a public competitive sale of property to the highest and best bidder, and an auctioneer is a licensed person who makes it his business to represent owners of property in making such sale, for which he charges a commission or other compensation.

§ 2. **Whose agent is auctioneer?**—He is the seller's agent, except in the matter of book entries of the sale, made at the time, in which case he is the agent of both buyer and seller. So he or his clerk may bind the buyer or seller by a memorandum of the sale in writing as their agent in cases where the law requires a contract to be in writing, as where the sale is of real estate or for the lease thereof for more than a year (Code, § 5561). But oral evidence may be admitted to prove that the memorandum of sale does not contain the real agreement. (2 M's. Real Prop., § 1289.)

§ 3. **Auctioneer's authority.**—He may close the sale, grant a certificate or other evidence of the sale, and receive the money; but no one can sell under his license, except one actually and bona fide in his employment and a resident of his county or city, the commission being actually and bona fide for the auctioneer's benefit. He can sell at only one regular establishment under his license, except he may sell anywhere in his county or city public stocks, houses, lots, and furniture, or ships or vessels, on the premises where the same may be, or at the exchange or the store of a licensed merchant declining business, or goods in the original form and packages as imported, and bulk articles such as have usually been sold in

warehouses, or in the public streets, or on the wharves, or as at such other places in his county or city as shall be desired by the owner or importer of such bulky articles or imported goods. A violation hereof is punishable by a forfeiture of \$20 to the prosecutor. (Tax Bill, § 60.)

An auctioneer must sell upon the terms named by the owner. He has no authority to warrant the goods unless actually conferred by the owner. If an auctioneer deviates from the instruction of the owner, he is liable in damages. Unless advertised to be without reserve (which means that the property will positively be sold and that the seller will not bid), an auctioneer may withdraw the property from the sale at any time, for there is no contract made until the auctioneer accepts the bid. An auctioneer cannot be a purchaser, or interested in any purchase made. (1 M's Real Prop., § 1289.)

As the relation of seller and auctioneer is that of principal and agent, for the general law on this subject, see *Agents and Agency*.

§ 4. By-bidding.—Secret bidding by the owner or his agent in order to puff the price, makes the sale not binding on the purchaser; but an owner may openly bid, unless the sale is advertised to be without reserve. (See *Sale or Exchange, etc.; Contracts*.)

§ 5. When buyer need not take property.—False representations of a material fact, or the failure of the seller to give a good title, will relieve the buyer of his purchase, and any deposit made should be returned to him. (See *Sale or Exchange, etc.; Contracts*.)

§ 6. Resale at risk of buyer.—If a buyer, without just excuse, fails to comply with his bid, the owner may resell the property at such buyer's risk. (See *Sale or Exchange, etc., Contracts*.)

§ 7. Classes of auctioneers, and licenses.—There are three classes of auctioneers, as follows:

(1) *General auctioneers.*—He may sell any goods, wares, merchandise, or other articles not prohibited by law. His license tax is \$50, and in cities, \$2 additional for every 1,000 above 5,000 inhabitants, not exceeding \$130 in any case. He also pays one-fourth of one per cent. on the yearly sales. But he is not required to pay the percentage tax on sales made

under order of court, or for persons acting as administrator, executor, guardian, trustee, or in other fiduciary capacity, where he only cries the sale and grants the certificate thereof. (Tax Bill, §§ 61 to 63.)

All auctioneers, except tobacco auctioneers, must keep an account of sales, and on oath make statements and answer interrogatories as to same upon request of the commissioner. (Tax Bill, § 59.)

(2) *Real estate auctioneer*.—He may sell, in his county, or city, at auction or privately, any real estate in Virginia intrusted to him for sale; but he cannot negotiate loans upon mortgage of real estate, or otherwise, without a license as a private banker, under penalty of \$100 to \$1,000. His license tax is \$50; if in a city or town of 5,000 or under \$75; if in a city from 5,000 to 20,000, \$100; if in a city over 20,000, \$125. (Tax Bill, §§ 64 and 65.)

(3) *Tobacco auctioneer*.—He may sell at auction any tobacco not prohibited by law to be sold. If he makes an unlawful sale, he is fined from \$50 to \$500. His license tax is \$25, except in a city, when it is \$50; and in an incorporated town an auctioneer for any warehouse or warehouses in which was sold during the previous year, ending April 30th, 5 millions of pounds or more of tobacco, must pay \$50, but where the sales are less, the tax is only \$10. (Tax Bill, §§ 66 and 67.)

(4) *Live stock auctioneer*.—He may, in his county or city, at auction or privately, for himself or others, sell horses, mules, and other live stock. The tax is \$50, where commission and profits from sales is not over \$1,000; if over \$1,000, \$1 per \$100 or fraction thereof for the excess. If he buys and sells on his own account, he must obtain a merchant's license (see *Licenses and License Taxes*, section 15). A city or town may prescribe an additional tax. (Tax Bill, § 67-b.)

§ 8. Who may sell at auction without a license. No one can sell at auction or public outcry, for compensation, without a license, except as follows:

(1) The estate of a deceased may be sold by his executor or administrator or his agent, according to law or provision of the will.

(2) Property conveyed by deed of trust or decreed or

ordered to be sold by a court, may be sold according to the deed, decree, or order.

(3) Any person may sell agricultural product of this State arising from his own labor or labor under his control, or his real or personal estate not purchased or sold on speculation.

(4) Any officer may sell property levied on, by him under execution or other legal process.

(5) Licensed commission merchants may sell live or dressed fowls, fresh vegetables, and fresh fish, upon taking out license as a common crier (see section 9, below). (Tax Bill, § 58.)

§ 9. Common crier, and his license.— A common crier is one who is licensed to cry off sales of property, for compensation. He may, except in cities of over 15,000 inhabitants, cry for sale at any place in his county or city, any property, real or personal for an auctioneer, executor, administrator, trustee, guardian, or committee of a lunatic, or the owner of the property, when such owner is authorized to sell the same by auction, but he shall not conduct a sale otherwise than under the present and immediate direction of the property-owner or other person authorized to sell the same, nor shall he cry such property or conduct such sale by an agent. He shall not, as such crier, receive money on account of the sale or issue receipts. He may receive for his service a stated compensation but not any commission or percentage on sales, nor any specific or contingent interest in the sale as the compensation for his services, directly or indirectly. A common crier in a city of over 15,000 inhabitants, may sell fowls, butter, fresh fish, fresh vegetables, fruit, or articles of like perishable nature. Selling without a license or other violation of this law, is punishable by a fine from \$50 to \$500. The license tax is \$5. (Tax Bill, §§ 71-72.)

§ 10. Useful forms as to auction sales.

No. 1. CONTRACTS FOR AUCTION SALE OF LAND DIVIDED INTO PARCELS.
[See Nos. 3 and 4, under *Real Estate Agent*.]

No. 2. MEMORANDUM IN WRITING OF SALE OF LAND AT AUCTION.

(Signed by the Purchaser and the Auctioneer and Witnessed at the

Time of the sale.) This is to certify that I have this day bought of----- through W. D. H. & Co., Real Estate Agents and Auctioneers, South Boston, Va., the following real estate as shown by map and survey, and on terms and conditions announced at said sale, \$1.00 cash in hand paid, the receipt whereof is hereby acknowledged, the same being lot No.-----, block (or tract No.-----), containing----- acres, for which I agree to pay \$----- per lot (or acre).

Dated-----, 192---

P. P.

Witness,

A. A., Auctioneer.

AUTOMOBILE LAW

- § 1. Unlawful to use automobile, motor-cycle, etc., until registered, numbered, and licensed
- § 2. Owner's certificate of registration and license; number plate; fee
- § 3. Dealer's certificate of registration and license; fee
- § 4. Garage license; fee
- § 5. Chauffeur's license; fee
- § 6. When licenses to end
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- § 8. Non-resident's use of highways. See Code, § 2137, as amended by Acts 1920, p. 283
- § 9. Duties on passing persons riding or driving
 - (1) When driving in opposite directions
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 - (1) Rights to use of road or street
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- § 22. Taking or stealing a car
- § 23. Driver of vehicle to stop at certain railroad crossings
- § 24. Fast riding, driving, or racing
- § 25. Driving with the muffler out; penalty; effective when adopted by supervisors
- § 26. Operator injuring person or property by collision, etc., to stop and render assistance, etc.

§ 1. Unlawful to use automobile, motor-cycle, etc., until registered, numbered, and licensed.—It is unlawful to run, drive, or operate any automobile, locomobile, motor-cycle, motor-bicycle, motor-tricycle, or any vehicle of any kind run by electricity, steam, gas, gasoline, or other motive power except animal power, on or along or across any public road, street, alley, highway, avenue, or turnpike or any county, city, town, or village in the State, except and until they are duly registered, numbered, and licensed. Hereafter, the word "machine" or "motor vehicle" will be used to include automobile and the other wheeled vehicles operated or propelled by any form of engine-motor or mechanical power. (Code, § 2125; Acts 1919, p. 93).

But this act does not apply to traction engines, or any locomotive engines or electric car running on rails; and while machines owned by the State, counties, and cities and used for purely State, county and municipal purposes must be registered, no fee is charged therefor or for number plate. (Code, § 2148.)

§ 2. Owner's certificate of registration and license; number plate; fee.—"Before the operation of any motor vehicle the owner shall file with the secretary of the Commonwealth for recordation in that office a statement showing the number of the motor or engine, name of the manufacturer, when and from whom purchased and the address of such seller and purchaser. The owner of every motor vehicle in this State, whether the said motor vehicle is in use or not, shall have the title to same recorded with the secretary of the Commonwealth, and no motor vehicle shall be purchased or sold until the title has been so recorded, provided, that this requirement shall not apply to new machines in the hands of a licensed dealer and handled by said dealer as a representative of the manufacturer." (Code, § 2126, as amended by Acts 1920, p. 596.)

The recordation fee is \$1. (Acts 1919, p. 93, and Acts, 1920, p. 596, § 3.)

The Secretary of the Commonwealth issues the certificate, giving the machine a number, and the certificate must be firmly attached to the machine in an easily accessible place, and shown to any sheriff, constable, policeman, or other peace officer when demanded. (Code, § 2127.)

In plain view upon the front and rear of each machine there must be a number plate, furnished to the applicant in duplicate by the Secretary of the Commonwealth, followed by "Va." and the year for which issued. And view of the number plate must not be obscured by dirt, grease, bumper, tire, tireholder, or anything else. (Code, § 2131, as amended by Acts 1922.)

The fee for annual certificate of registration and license and plate (one-half, if on or after September 1st), is 60 cents per horse power, but for an automobile, not under \$10; for a motor-cycle, not under \$5, and \$2 for side car attached; and the fee for trucks is \$15 for first ton capacity, and \$5 for each additional 1,000 pounds or fraction thereof capacity, and the fee for trailers, \$10 for the first ton and \$3 for additional 1,000 pounds or fraction thereof; and such trucks or trailers, equipped with two or more solid tires, using the public roads, is (under penalty of \$10 to \$20 fine), limited in carrying capacity to 2,400 pounds, nor over 700 pounds per inch width of tire, measured between the flanges of the rim. Operating without a license on or after February 1st, is punishable by a fine of \$10 to \$20, each day's use, in the justice's or court's discretion, to constitute a separate offense. (Code, § 2132, as amended by Acts 1919, p. 62.)

On proof of the loss of the license, the Secretary of the Commonwealth furnishes a duplicate for \$1, and if the number plate is lost, he will give him, without charge, permission to make a new one like the original. (Code, § 2135.)

On parting with a machine, the owner returns the license, and if he purchases another during the year, a new license is sent him for \$1, or for the difference in the machines. On request to Secretary of the Commonwealth and payment of \$1, the license may be transferred to a pur-

chaser. A number plate or license cannot be used on another machine. (Code, § 2136, as amended by Acts 1922.)

§ 3. Dealer's Certificate of registration and license; fee. Every manufacturer, agent, or dealer, on or before January 1st, in each year, or before he commences to operate machines to be sold by him, must make application to the Secretary of the Commonwealth for a dealer's certificate of registration and license. The application must state the make of machines handled, and the probable number that will be disposed of during that year. On the payment of a fee of \$50, the Secretary issues the certificate in due form. (Code, § 2128.)

§ 4. Garage license; fee.—A garage is a place of storage for hire or where three or more motor-vehicles are stored or housed at any one time for compensation other than to owner of building, except where automobiles or motor-vehicles are kept by the owners without payment for storage. (Code, § 2150.)

The license for keeping a garage for the storage or hire of machines in the country and in towns of less than 2,000 inhabitants, is \$15; and 50 cents each for the storage capacity of each machine over five machines; in towns of 2,000 inhabitants or more, \$25, and 50 cents each for the storage capacity of each machine over five machines; in cities of the second class, \$35, and 50 cents for each additional storage capacity; in cities of the first class, \$100, and \$1 for each additional storage capacity; at public watering places or summer resorts, if the proprietor keeps the garage, or if run by another person for six months or less, the tax is one-half the above sums. (Code, § 2149.)

§ 5. Chauffeur's license; fee.—Every person besides the owner, or a qualified member of his family, or a servant regularly employed for other purposes by the licensed owner, who operates a machine for pay, must first take out a chauffeur's license to operate machines in this State. The application is to the Secretary of the Commonwealth, giving the name, residence, post-office address, age, and experience in operating automobiles, and must be sworn to. Appended to the application must be a statement by two reputable citizens that he is a fit and competent person to operate a machine. On payment of \$5, the Secretary issues a license in due form

and badge, which is to be carried by him at all times while operating a machine, the badge to be in plain view on the lapel of his coat or on the front of his cap. (Code, § 2129, as amended by Acts 1919, p. 62.)

§ 6. When licenses to end.—All of the foregoing certificates or licenses end December 31st of the year for which issued. (Code, § 2130.)

§ 7. Speed Limit. By section 2138 of the Code as amended Acts 1922; "Every machine operated on any public highway or street of this State shall be driven with ordinary care at all times, having regard to the width, traffic and use of the highways and the protection of life and property. If the rate of speed of any machine being operated on any public highway of this State exceed 30 miles an hour for a distance of one-eighth of a mile, such rate of speed shall be conclusive evidence that the person operating the said machine is operating the same at a rate of speed that is not reasonable and proper and in violation of the provisions of this chapter. If the rate of speed of a machine being operated on any public highway of this State, where the operator's view of the highway and traffic is obstructed, or when approaching an intersecting public highway, or when traversing a bridge, or sharp curve in either the alignment or grade of the highway, shall exceed 15 miles an hour, such rate of speed shall be conclusive evidence that the person operating such machine is operating the same at a rate of speed greater than is reasonable and proper and in violation of the provisions of this chapter.

"Provided that no machine which has a seating capacity of more than seven passengers shall be operated on any public highway of this State at a rate of speed in excess of 20 miles per hour; and provided that no machine shall be operated at a speed of more than 15 miles per hour when a street or highway passed the built-up portions of unincorporated towns or villages; and provided that no machine shall be operated at a speed of more than 10 miles an hour at points on any public highway outside of incorporated towns and cities where there is a gathering of horses or persons. Provided that if the operator of a machine overtakes any vehicle or machine and indicates his desire to pass the said vehicle, or machine, it shall be the duty of the driver of said machine or vehicle to bear

to the right as far as practicable and reduce the speed of said vehicle or machine to less than 20 miles per hour so as to enable the machine to pass on the left hand side at a rate of speed not in excess of 25 miles an hour."

§ 8 Non-resident's use of highway.—See Code, § 2137, as amended by Acts 1920, p. 283.

§ 9. Duties on passing persons riding or driving.—

(1) *When driving in opposite directions.*—The operator, conductor, or driver of any automobile, etc., must keep a careful look ahead for the approach of horseback riders, or vehicles drawn by horses or other animals, and upon their approach, must slow up, keep his machine under thorough and careful control, giving ample roadway to such rider or vehicle, and if signalled by such rider or occupant of such vehicle, or be otherwise requested to do so, must immediately bring his machine and engine to a full stop and allow ample room and time for such rider or vehicle to pass; and must (if a male), upon request, lead the horse or horses past his machine. If any such horse give evidence of fright, the duty of the operator is the same as if he had been signalled to by the rider or the occupant of the vehicle. (Code, § 2139.) See, also, section 15, (3), below. And due diligence must be used to see if the horse is frightened.

(2) *When driving in the same direction.*—The operator, conductor, or driver, of any such machine on overtaking a horse or vehicle traveling in the same direction, must slow down his speed, signal for the road by bell or gong or horn, and if the horse or vehicle stop he must pass at a rate of speed not greater than 10 miles an hour. If such vehicle or horse does not stop, and the operator, etc., desires to pass, he must do so at a rate of speed not greater than may be necessary, and shall in all cases, use due diligence and care not to frighten the horse or horses. In case of a machine passing a horse or vehicle going in the same direction, the provision of section 2139, (see section (1), above), as to passing on meeting, applies to the operator, etc., except the horse or horses must be held until they become quiet, and then the machine may proceed. (Code, § 2140.) See, also, section 15, (3), below, and *Roads, etc.*, section 8, (8).

§ 10. Lock, brake, and lights.—Every machine must have

a lock, key, or other device to prevent its being set in motion, and the machine must not stand or remain unattended in any street, avenue, road, alley, highway, park, parkway, or other public place without being locked, or fastened. It must also have a good and sufficient brake or brakes, and a suitable bell, horn, or other signal device; and must have displayed from one hour after sunset to one hour before sunrise at least one white light, throwing a bright light at least 100 feet in the direction in which the machine is going, and must have in the rear one red light, which must effectually illumine the tag on the rear. (Code, §§ 2141-2.)

§ 11. Driving around curves, etc.—In case of a curve, bend, or other place where the road is not plainly visible for 300 feet ahead, the machine must be run to the right hand side of the road sufficiently to allow ample room for the passage of other vehicles or machines, whether approaching or not. When two machines or vehicles approach at an angle, the one to the right has the right of way; and when one intends to turn, to stop or turn to the right or left, if there is approaching behind another within 50 feet, the driver shall give a signal of his intention to do so. (Code, § 2143, as amended by Acts 1922.)

§ 12. Duty of highway commissioner and other officers to enforce laws; commission to make rules and regulations, and appoint special police to enforce them.—See Code § 2143 and *Roads, etc.*, section 8, (15).

§ 13. Penalty for violation of act; appeals.—“Any person failing to perform any duty imposed by any section of this act or violating any provision or condition herein set forth,” shall be fined not less than \$2.50, or jailed from 5 to 30 days, or both; but an appeal may be taken to court. (Code, § 2145, as amended by Acts 1918, p. 410.)

§ 14. Civil liability by statute; seizure and sale of machine.—Besides the fine or imprisonment, “any person violating any of the provisions of this act” (see sections 7 to 11, above), shall be liable for damages actually sustained by such violation, and such violation shall be sufficient grounds for an attachment of the motor vehicle, if it is being driven or used with the knowledge, consent or approval of the owner, and there shall be a *prima facie* presumption that the said motor

vehicle is being used or driven with the knowledge, consent, and approval of the owner. The procedure, pleadings, and trial of the cause shall be the same as in other attachment proceedings under the provisions of the Code of Virginia of 1919, and acts amendatory thereof. But any attachment of any motor vehicle, or sale thereof under this chapter shall be subject to all valid and properly recorded liens thereon." Code § 2146, as amended by Acts 1922.)

The sheriff, constable, or sergeant, must post at least ten days' notice of the time and place of sale at three or more public places in the county or corporation, and also publish notice thereof for two weeks in the local paper. The officer then sells to the highest bidder for cash, and any surplus, after deducting fine, cost, and damage, is turned over to the owner. (Code, § 2147.) If the damage is for a personal injury, a justice has no jurisdiction. (Code, § 6015.)

§ 15. Civil liability for other negligence.—The act expressly says that nothing therein "shall affect the right of any person injured in his person or property by the negligent operation of any machine, to sue and recover damages as heretofore." (Code, § 2148.)

So there are two grounds for recovery, first, for violation of some provision of the statute as to speed, passing persons riding or driving, providing lock, brake, or lights, or driving around curves, etc., and second, negligence in other respects under the common law as to negligence, as follows (as compiled from the general automobile law) :

(1) *Rights to use of road or street.*—The rider or driver of a horse has no superior right on a road or street to that of the operator of an automobile or other motor vehicle. They all, along with pedestrians, and even a beggar on his crutches, have equal rights thereon; but each is required to use ordinary care and caution to avoid inflicting or receiving injury.

(2) *Degree of care required.*—While each is required to exercise reasonable and ordinary care toward the other, an automobile being a more dangerous vehicle, "ordinary care" in such case, is a higher degree of care than is required in the case of a less dangerous vehicle. The amount or degree of care depends upon the particular situation in each case, as the

place, presence or absence of other vehicles and travelers, whether a horse driven is wild or gentle, whether the vehicle and power used are common and new to the road or street, the known tendency of any feature to frighten animals, etc.; and in the case of an automobile there must be considered the dangerous character of the machine, its general appearance, the noise accompanying its operation, its new use in the vicinity, its tendency to frighten horses, etc. So that the standard or degree of care varies with different situations and vehicles and the different duties owing in respect thereto. When the circumstances require great care it is but ordinary care under the circumstances; when they require but slight care that also is ordinary care; hence ordinary care varies with the facts of each particular case, and the same act or omission may be negligence as to one person and not as to another. Ordinary and reasonable care is such care as an ordinarily careful and prudent person would exercise under like circumstances.

(3) *Meeting or overtaking vehicles, etc.*—In the case of meeting vehicles, each should pass to the right, and in the case of overtaking a vehicle, the front one should drive to the right. (Code, § 4739; see sections 7 and 9, above). For the duties of an operator of an automobile on passing persons riding or driving, see section 9, above.

(4) *As to speed.*—For the speed limit, see sections 7 and 9, (2), above. If an automobile caused an accident while exceeding the speed limit, it is prima facie a case of negligence.

(5) *As to pedestrians.*—The operator of an automobile and a pedestrian must each use ordinary care to avoid receiving as well as inflicting injury; blowing a horn or a whistle or ringing a bell or gong, without slackening speed of an automobile, is not sufficient, but the speed must be slackened or the machine even stopped, if it be reasonably necessary to prevent an accident. He must, in a populous city, keep a vigilant watch ahead, and on the first appearance of danger take proper steps to avoid an accident. On the other hand, a pedestrian is not required to stop, look, or listen before crossing a street, he is only required to use ordinary care under the circumstances. He is not required to be continuously looking or listening to ascertain if automobiles are approaching.

(6) *Who liable for an injury.*—Where an injury is inflicted by an automobile on a road or street, the owner is liable, if operated by him or under his control or in the custody or control of his agent or servant acting within the scope of his employment and for the benefit of the owner. Where he is present, he is always liable, unless the operator disobeys instructions.

If the operator or servant is using the machine contrary to the owner's express direction, or for his own benefit or pleasure, the owner is not liable. Where the machine is in charge of a member of the owner's family, for such member's own pleasure or benefit, the owner is not liable; yet he is liable where the machine is for the use and conveyance of his family.

The owner is liable where he furnishes an operator to demonstrate a car.

The operator is liable also, if his negligence cause the injury.

If a person who rents or leases a machine is in control of it or places one employed by him in control, he is liable; but he is not liable where the operator is furnished with the machine.

An occupant of an automobile is not liable, unless he was either the operator, the person in charge, or the owner. (See some digest of book on automobiles.)

§ 16. Lien of garage keeper for repairs.— See *Liens of Mechanics and Others*, sections 21 and 23.

§ 17. Unauthorized use of automobile or motor-vehicle. It is a misdemeanor, punishable by fine not over \$500 or jail not over 12 months, or both (Code, § 4782), for a person, without the owner's consent, to take or cause to be taken, an automobile or motor vehicle, and operate or drive, or cause the same to be done, for his own private use or purpose. (Code, § 4480.)

§ 18. Injuring hired automobile or not paying for use; punished.—If a person hiring an automobile or other vehicle, willfully or negligently injure or damage it by hard or reckless driving or using, or permit someone else to do so, or hire the same to some other person, or if having procured the same without previously making arrangements for credit,

and use it without paying therefor, with intent to cheat or defraud, he shall be fined from \$10 to \$50. (Code, § 4567.)

§ 19. Running automobile, etc., while intoxicated, etc., punished.—It is a misdemeanor, punishable by a fine not over \$500 or jail not over 12 months, or both (Code, § 4782), to drive or run an automobile, car, truck, engine or train while under the influence of intoxicants. (Code, § 4722.)

Even taking a drink of ardent spirits in an automobile, or any person in charge of or employed in connection with an automobile, procuring for or assisting in procuring, or giving any information or direction by which another may secure, ardent spirits, is punishable by a fine not over \$500 or jail not over 12 months, or both. (Code, §§ 4631, 4782.)

For seizure and sale of automobile used in transporting ardent spirits, see Code, §§ 4657-8, and *Intoxicating Liquors*.

§ 20. Putting glass, nails, tacks, etc., into road.—See *Roads, Bridges*, etc., section 8, (13).

§ 21. Act regulating purchase, sale, storage, and repair. No motor-vehicle shall be, knowingly, sold or purchased unless it contains the manufacturer's number, or contains an "obliterated, erased, or mutilated manufacturer's number." The manufacturer must issue a manufacturer's bill of sale containing the number on the engine or motor. In all other sales or purchases, the original bill of sale must be assigned to the purchaser, witnessed by two persons, or acknowledged before some one authorized to administer oaths, and kept attached to the manufacturer's bill of sale. Any violation hereof is fineable not over \$500, or jailable not over 6 months, or both. Intentional removal, defacing, changing, destroying or obliterating, any trade mark, or identification or serial number or mark, is punishable by a fine not over \$500 or jail not over 12 months, or both. Or knowingly to have in possession a motor-vehicle with such erasure, etc., is fineable \$100 to \$300, or jailable 3 to 12 months, or both, unless within 10 days after it came into his possession or 5 days from his knowledge of such matters, he file with the Secretary of the Commonwealth a verified statement, showing the source of his title, the proper trade-mark, or number, if known, the manner and reason of such change, etc., if known, the length of time held, and price paid. The Secretary of the Com-

monwealth, where the old engine number has been removed, etc., will assign a new number, which must be stamped on the engine. (Acts 1919, p. 93, §§ 4 to 9, 12, and Acts 1920, p. 596, amending § 9, Code, §4782.) Acts 1920, amending section 9 of the act omits the paragraph requiring garages, etc., to keep records of cars, and the paragraph as to starting, etc., or damaging, etc., cars.

§ 22. Taking or stealing a car.— Removing, driving away, taking apart, or towing away a motor vehicle, without the consent of the registered owner, is punishable by a fine not over \$1,000, or jail not over 12 months, or both; but this does not apply to officers in the performance of legal duties. Or to do so, with intent to steal, is larceny, punishable by penitentiary 1 to 10 years; and such removal, etc., without consent, is prima facie evidence of intent to steal. (Acts 1919, p. 93, §§ 10-11.)

§ 23. Driver of vehicle to stop at certain railroad crossings.—See *Roads, etc.*, section 8, (14), which uses the generic term vehicle, which is comprehensive enough to include automobiles and all other motor vehicles.

§ 24. Fast riding, driving or racing.— See *Roads, etc.*, section 8, (9).

§ 25. Driving with the muffler out; penalty; effective when adopted by supervisors.—By Acts 1922: "It shall be unlawful for any person to drive or permit to be driven on the public roads and highways of this State any motor vehicle at any time with the muffler cut out or not in operation, except in cases of accident to said muffler. Any person violating the provisions of this act shall be guilty of a misdemeanor and shall be punished by a fine of not exceeding fifty dollars. Provided, however, that the provisions of this act shall not be effective in any county of this State until adopted by the board of supervisors of such county."

§ 26. Operator injuring person or property by collision, etc., to stop and render assistance, etc.—By Acts 1922: "It shall be unlawful for the driver or operator of any motor vehicle or other vehicle, which shall have run into, over, or collided with, or in any way injured, any person, persons or property upon the public highways, streets or alleys of this State, to fail to stop such vehicle and return to the place of

the accident and render such aid and assistance to the person, persons or property so injured as may be necessary or possible under the circumstances, giving his name and address to the person or person so injured. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not more than \$200, or be imprisoned not exceeding one year, or both."

BAGGAGE

See Hotels

§ 1. Rules and regulations as to shipment of baggage

- (1) Personal baggage defined
- (2) Sample baggage defined
- (3) Other articles checked as baggage
- (4) Articles checked at excess baggage rate
- (5) Public entertainment paraphernalia
- (6) Dogs
- (7) Corps
- (8) Baggage prohibited because of weight, size, shape value, or character
- (9) Authority for checking
- (10) Delivery of baggage for checking
- (11) Baggage allowance as to weight and value
- (12) Baggage for or from flag stops
- (13) Storage charges
- (14) Unclaimed baggage

- (15) Lost duplicate checks
- (16) Forwarding baggage without presenting ticket, etc.
- (17) Baggage insufficiently or improperly routed
- (18) Excess rates
- (19) Claims

§ 2. Carrier's liability as to passenger's baggage

- (1) As to baggage or effects retained in passenger's possession

- (2) As to baggage delivered to the carrier

§ 3. Baggage at hotels and boarding houses

§ 1. Rules and regulations as to shipment of baggage.—

The Virginia statute provides that a railroad company may make reasonable rules and regulations for the transportation of baggage, which may be changed from time to time by the State Corporation Commission (Code, § 3990.)

The following rules and regulations on file with the Interstate Commerce Commission (see Southeastern Baggage Tariff No. 9) went into effect July 1, 1921, (for a copy write Mr. W. H. Howard, Agent, 602 Healey Building, Atlanta, Ga.)

(1) *Personal baggage defined.*—This consists of wearing apparel, toilet articles, and similar effects in actual use, and necessary and appropriate for the wear, use, comfort, and convenience of the passenger for the purpose of the journey, and not intended for other persons nor for sale. Money, jewelry, negotiable paper and like valuables, should not be enclosed in baggage to be checked. Carriers are not responsible for such articles in baggage, nor for damage caused by same. Personal baggage should be enclosed in receptacles provided with handles, securely locked, and sufficiently strong to withstand necessary handling, such as trunks, valises, tele scopes, suit cases, leather hat boxes, and satchels. If not locked, not over \$25 can be claimed for loss or damage. (Rule 4, of Baggage Tariff No. 9.)

(2) *Sample baggage defined.*—Sample baggage consists of samples of merchandise (including catalogues), carried by a commercial traveler, in trunks or other suitable containers, for use by him in making sales or other disposition of the goods represented thereby. Money, jewelry, etc., as above, should not be enclosed in sample baggage to be checked; if so, carriers are not responsible. (Rule 4, of Baggage Tariff No. 9.)

(3) *Other articles checked as baggage.*—The following articles, other than regular baggage, may be checked as baggage, without extra charge (being included in the baggage weight):

Sample adding, calculating, or talking machines, or cash registers, computing scales, or cream separators, or typewriters, in trunk, bags, bundles of personal wearing apparel securely roped, or immigrant bags; boxes with handles and roped, containing wearing apparel; invalid chairs for passengers, bicycles in trunks; fish or fish eggs, birds or small animals in crates for stocking purposes, and empty cans returned free; miner's packs; sample opera chairs or school desks in case; surveyor's tools, wrapped, and tool chests. But not over \$25 can be claimed for loss or damage, unless a higher valuation is given at the time and a small extra charge paid therefor. (Rule 5, Baggage Tariff No. 9.)

(4) *Articles checked at excess baggage rate.*—The following articles are checked at excess baggage rate for gross weight, not less than for 50 pounds; but for burial case, casket or coffin (empty), or case containing either, in emergency, without passenger, double excess baggage rate, and not under \$2.40.

Baby carriages, go-carts, and sleighs when used in connection with journey of child, with pillows, robes, and blankets securely fastened, baseball, football, club, cricket, golf, lodge, Lacross, polo, or soccer paraphernalia, and fishing rods and tackles, in enclosed receptacles; bicycles not in trunks; guns (unloaded), in substantial case; moving picture films and reels; small domestic pets, cats, birds, etc., in crates or cages; saddles in bags; and children's tricycles or velocipedes; etc. But not over \$25 can be claimed for loss or damage, unless a higher valuation is given at the time and a small extra charge paid therefor. (Rule 5, Baggage Tariff No. 9.)

(5) *Public entertainment paraphernalia.*—For transporting such paraphernalia in regular or special baggage cars for organizations or individuals giving theatrical performances, concerts, lectures, or other public entertainments, indoors or out-of-doors, see Rule 6, Baggage Tariff No. 9.

(6) *Dogs.*—When accompanied by passenger, dogs not over \$25 in value, not for other persons nor for sale, if prop-

erly muzzled and with strong securely fitting collar or harness, on chain or other strong leash, in substantial crates with strong handle, will be transported in baggage service under a revenue check, and charged at excess baggage rates for gross weight, the minimum for each dog on leash as for 100 lbs. of excess weight baggage, and for one or more dogs in each crate, as for 50 lbs. of such weight. The limit of value of one or more dogs in crate is \$25. Dogs must be claimed immediately upon arrival; carriers assume no obligation to store or care for dogs at station. Passenger must feed and water en route and at stations. Charges must be prepaid, where there is an agent on duty. (Rule 7, Baggage Tariff No. 9.)

(7) *Corpse*.—A corpse will be checked and transported in baggage service on presentation, by escort in charge, of a first class adult ticket marked "corpse" (to cost not less than \$1.20). The escort must also hold ticket and accompany the corpse. (Rule 8, Baggage Tariff, No. 9.) A corpse will be accepted for transportation only on presentation of a transit permit, showing physician's or coroner's certificate, name of deceased, date and hour of death, age, place of death, cause of death, etc., together with the health officer's permit for removal, and funeral directions and baggage agent's certificate as prescribed by statute. (Code, § 1728; see § 1565.) But a corpse will not be accepted or transported if it be offensive or if fluids escape from the case, notwithstanding the presentation of permits or certificates. If the corpse has the return portion of a first class adult round-trip ticket (half fare ticket, in case of a child) it may be used. The corpse will not be checked beyond a station at which a wagon transfer is required except where special authority is given. The escort must make all arrangements for such transfer. When a corpse is checked to a station where there is no agent, the company assumes no responsibility for the care of the corpse there. The corpse box must have at least four handles and must be plainly marked showing name, destination, route, and to whom shipped. The corpse's baggage may be checked upon presentation of his ticket as in the case of other free baggage. If the casket and dead body weigh more than 500

pounds, the excess will be charged at excess baggage rates. (Rule 8, Baggage Tariff No. 9.)

Where the deceased died of a contagious or infectious disease, the body must be first thoroughly disinfected by arterial cavity injection of an approved disinfecting fluid, etc., by a licensed embalmer, and the body enveloped in dry cotton, and wrapped in a sheet securely fastened, etc. If the deceased did not die of a contagious or infectious disease, and the shipment can reach its destination within 30 hours from the time of death, the body must be encased in a sound coffin or casket and enclosed in a strong wooden box. (Code, § 1728.)

(8) *Baggage prohibited because of weight, size, shape, value, or character.*—Among others named, are dangerous articles, empty trunks or other containers, food stuffs, fragile articles, and receptacles marked "fragile", fruit, furniture, gambling devices, glass, glassware or chinaware (except samples), household articles, ice, liquids, meats, merchandise, perishable articles, phonograph records, sewing machines, valise with article attached, property over \$2,500 in value, vegetables, single baggage weighing over 250 pounds, etc. (Rule 9, Baggage Tariff, No. 9.)

(9) *Authority for checking.*—The privilege of checking baggage only attaches to a ticket, where the baggage belongs to the owner of the ticket. Checks will only be issued to destination of ticket or to points where stop-overs are allowed, and only via route of ticket. Baggage cannot generally be checked to two or more destinations on same ticket. (Rule 1, Baggage Tariff No. 9.)

(10) *Delivery of baggage for checking.*—Baggage must be presented with ticket to baggage agent in sufficient time prior to departure of train to permit agent to obtain record, weight, and issue the necessary checks for same. The company does not guarantee to forward baggage on same train with passenger or within a given or specified time limit and reserves the right to forward baggage on same train or upon preceding or following train. When baggage is not delivered in time to be properly weighed and necessary collection made, it will be forwarded on first convenient train, C. O. D. for any extra charges. (Rule 2, Baggage Tariff, No. 9.)

(11) *Baggage allowance as to weight and value.*—Baggage not exceeding 150 pounds in weight, nor \$100 in value will be checked without additional charge for each adult passenger, and half that weight and value for a child. Excess weight will be charged for at excess baggage rates.. Any piece of baggage (with necessary exceptions), which exceeds 45 inches in length, height or width is charged as excess at the rate of five pounds for each inch, with a minimum charge of 30 cents. (Rules 10 to 12 of Baggage Tariff No. 9.)

(12) *Baggage for or from flag stops.*—Baggage may be checked to a flag stop or where the agent is not on duty at the time of its arrival, but the owner must notify the baggage man and surrender the duplicate check before arrival, otherwise it will be carried to the next station where there is an agent. (Rule 2, Baggage Tariff No. 9.) At a flag stop or where the agent is not on duty, the baggage man will receive baggage, baby carriages, or other articles permitted to be checked, without a check, and he notifies the agent at the junction point or destination to make the necessary collection, if any excess charges thereon. (Rule 13, Baggage Tariff No. 9.)

(13) *Storage charges.*—Baggage will be held 24 hours without charge. Storage will be charged on each piece of baggage, either inbound or outbound, checked or not checked, remaining at stations over 24 hours, as follows:

For the first additional 24 hours or fraction thereof, 30 cents; for 2 days, 42 cents; 3, 54c; 4, 66c; 5, 78c; 6, 90c; 7, \$1.02; 8, \$1.14; 9 to 30, \$1.20; 31, \$1.32; 32, \$1.44; 33, \$1.56; 34, \$1.68; 35, \$1.80; 36, \$1.92; 37, \$2.04; 38, \$2.16; 39, \$2.28; 40 to 60, \$2.40. Baggage received on Saturday will be held without charge until the same hour Monday. Baggage received at any time Sunday, or on a legal holiday, will be held without charge until midnight on the following day. Legal holidays are treated the same as Sundays. When a legal holiday falls on Saturday or Monday or is observed either of those days, the Sunday and the legal holiday combined will be treated the same as Sunday. No deduction will be made for Sundays or legal holidays after storage has begun. (Rule 14, Baggage Tariff No. 9.)

(14) *Unclaimed baggage.*—Baggage remaining on

hand unclaimed after 60 days, is sent to the unclaimed warehouse, and there held subject to the following charges; \$2.40, storage at destination station; 60c, transfer to warehouse; 90, warehouse storage for 30 days or fraction thereof; 60c, each 30 days, warehouse storage, thereafter, until sold at public auction. (Rule 14, Baggage Tariff No. 9.)

(15) *Lost duplicate checks.*—If a passenger loses a duplicate check and can prove ownership of baggage by accurately describing contents, it may be delivered after thorough identification, paying 50 cents for each lost duplicate check and by signing a lost check receipt. On return of lost check to the company, the amount will be refunded. (Rule 15, Baggage Tariff No. 9.)

(16) *Forwarding baggage without presenting ticket, etc.*—See Rule 16, Baggage Tariff No. 9.

(17) *Baggage insufficiently or improperly routed.*—See Rule 17, Baggage Tariff No. 9.

(18) *Excess rates.*—See Rules 20 and 21, Baggage Tariff No. 9.

(19) *Claims.*—The loss or damage is estimated as at the place and time of shipment. Except in case of delay or negligence, or damage in being loaded or unloaded, claims must be in writing within 6 months after delivery, or 6 months after a reasonable time for delivery; and suits for loss, damage or delay must be brought within 2 years and one day from said time. (Rule 18, Baggage Tariff No. 9.)

§ 2. Carrier's liability as to passenger's baggage.—

(1) *As to baggage or effects retained in passenger's possession.*—A passenger may take with him a reasonable quantity of personal baggage appropriate to the journey. As to what may be thus taken and liability therefor is subject to reasonable regulation. The carrier, whether a railroad company, steamer, hack, or other person who undertakes for hire to transport baggage of another must exercise reasonable care to protect such property from loss or injury. If the property is lost or injured by the carrier's negligence, the carrier is liable. The same rule applies to baggage in a sleeping car; but in this case a greater watchfulness must be exercised by the carrier for the safety of the baggage while

the passenger sleeps, and to this end it must provide a competent porter. (See various common law authorities.)

(2) *As to baggage delivered to the carrier.*—Where baggage is delivered to the carrier, the carrier is liable for the loss, or injury to the baggage, and negligence need not be proved, as in the case of the carrier of goods generally. The carrier is excused only where the loss or injury is caused by the act of God, the public enemy, or the acts or negligence of the owner himself. See *Common Carriers*. The liability commences when the baggage is delivered, even before it is checked, and continues until the baggage has reached its destination and the passenger has had a reasonable opportunity to take it away. After that time, his liability is that of warehouseman, i. e., he is liable only for failure to exercise reasonable care for its safety. Suit may be brought against the carrier to whom the baggage is delivered, by the person who checked the baggage or by the owner. The measure of damage for lost baggage is its value to the owner, and not its market value. A restriction as to liability does not bind unless the passenger has actual notice thereof before he started. (See various common law authorities.) By statute (§ 938), if a railroad company refuses or fails to receive property or to deliver it in a reasonable time, it forfeits from \$25 to \$100 to the party injured; but the party is not limited to such recovery, but may recover such damages as he may have sustained, under the statute (Code, § 5785; see 84 Va. 553.)

§ 3. Baggage at hotels and boarding houses.—See *Hotels*.

BAIL

See Justice of the Peace, and Absconding Debtors

§ 1. Bail in criminal cases

- (1) When allowed by justice
- (2) When allowed by court or judge
- (3) When allowed by bail commissioner
- (4) Bail by police justice, etc.
- (5) When bail increased or new sureties required
- (6) When accused bailed without trial or examination
- (7) Bail-piece; its form
- (8) Nature and sufficiency of bail
 - (a) Nature of bail
 - (b) Sufficiency of bail
- (9) Surrender of accused by surety
- (10) Bail by sheriff or sergeant, under capias or attachment

§ 2. Bail in civil cases. *See Absconding Debtors*

§ 1. **Bail in criminal cases.**—(1) *When allowed by justice*—In misdemeanor cases, and in felony cases where there is only a light suspicion of guilt, the justice, pending examination before him, or upon committing a person for trial in court, may admit him to bail, but no other justice can do so. (Code, § 4828.)

(2) *When allowed by court or judge.*—A court, or judge in vacation, may, before conviction, bail any one held for trial in his court; and if the court or judge refuses, or requires excessive bail, then the Supreme Court of Appeals, or one of its judges in vacation, may admit him to bail. (Code, §§ 4829, 4834.)

(3) *When allowed by bail commissioner.*—A bail commissioner has the same power to admit to bail as the court or judge of his county, but he cannot act after the court or judge has acted upon an application. However, if the bail commissioner refuses bail or requires excessive bail, then application may be made to said court or judge, and, in case of its or his refusal, to the Supreme Court or one of its judges. If the bail commissioner and the judge cannot act, then application may be made to the bail commissioner of an adjoining county, and if it be refused, or excessive bail required, then application (if the incapacity of the judge continues—otherwise, to him or his court), may be made to

the Supreme Court, or one of its judges. If the case be in a corporation court, if the court is not in session, and the judge is sick or absent, then the nearest circuit or corporation court, or its judge, may act; and if bail is refused, or excessive bail required, application may be made to the Supreme Court, or one of its judges. The fees of the commissioner are double those of a justice for the trial of a criminal case. (Code, §§ 4830-7, 4834-5.)

(4) *Bail by police justice.*—A police justice, civil and police justice, or special justice may admit to bail. (Acts 1922.)

(5) *When bail increased or new sureties required.*—The court, judge, justice, or bail commissioner may increase the amount of the bail or require new sureties. (Code, §§ 4836, 4833.)

(6) *When accused bailed without trial or examination.*—In misdemeanor cases, where the accused is to be carried to another county or corporation, or in any misdemeanor case, if he desire it, a court, judge, or justice before whom he is brought, may, without trial or examination, let him to bail, upon taking a recognizance for his appearance before the court of justice having jurisdiction of the case, the fact to be endorsed upon the warrant, which with the recognizance is to be returned to the proper court or justice, and the witnesses will likewise be recognized or summoned. (Code, § 4837.)

(7) *Bail-piece; its form.*—The clerk of the court, upon request, shall deliver to the bail, a bail-piece, in substance as follows:

“A. B., of the county (or corporation) of, is delivered to bail, unto C. D., of the county (or corporation) of, at the suit of the Commonwealth. Given under my hand this day of, in the year of, 192” (Code, §4838.)

(8) *Nature and sufficiency of bail.*—(a) *Nature of bail.*—Bail is the delivery of a person to one or more sureties, upon their giving, together with himself, sufficient bond for his appearance, he being supposed to continue in friendly custody instead of going to prison. This bond is technically called a “recognizance,” whereby a person, with or without

sureties, as the case may be, acknowledges himself to owe the Commonwealth a certain sum, on condition, if taken of the accused, to be void, if such person shall appear at the time and place stated, to answer for the offense, and shall not depart without leave. If the party be in jail, or in the case a minor, the recognizance may be taken of another person. (Code, §§ 4973, 4975.) The homestead is considered as waived, whether it is so expressed in the recognizance or not. (Code, § 4974.)

(b) *Sufficiency of bail.*—If the recognizance be to answer for a misdemeanor, it may be with or without surety, but if to answer for a felony, it must be with surety deemed sufficient. (Code, § 4973.) Parties offering surety may be examined on oath as to the sufficiency of their estate. In felony cases, the sureties should possess real estate. But excessive bail is forbidden by the Constitution; if excessive bail is required, the parties remedy is a habeas corpus.

(9) *Surrender of accused by surety.*—A surety may at any time take and surrender the accused to the court or judge; or, if the court is not in session, or the recognizance was taken by a justice, to the judge of such court, or a justice of the county or corporation; whereupon the surety is discharged from further liability. (Code, § 4982). If the surrender be before a judge or justice, he shall give the surety a certificate of the fact and the accused may be let to bail anew, and on failure to do so he is committed to jail. If the surrender be in court, it makes such orders as it deems proper. (Code, § 4102).

(10) *Bail by sheriff or sergeant, under capias or attachment.*—In case of an arrest on a capias for a misdemeanor (other than keeping gaming tables, etc., under § 4676 of Code), or on an attachment (other than one to compel the performance of a judgment, or of an order and decree in chancery), the officer arresting the accused may admit him to bail, taking the recognizance in the proper sum not less than \$200, unless a smaller sum be ordered by the court. The officer must return the recognizance to court on or before the return day; otherwise, he will be fined \$20; and if he take insufficient bail, he is fined at the discretion of a jury. (Code, § 4887.)

§ 2. *Bail in civil cases.*—See *Absconding Debtors*.

BAIL COMMISSIONER

See *Bail*

The circuit court or judge appoints one of its commissioners in chancery bail commissioner for the county. (Code, § 6188.)

Bail is admitted by bail commissioner of the county, or if he and the judge be incapable from acting, by one of an adjoining county. (Code, §§ 4830-1.)

The fees of a bail commissioner are double those of a justice of the peace, but not payable out of the State treasury. (Code, § 4835, as amended by Acts 1922.) See *Justice of the Peace*, div. X.

Recognizance is to be certified to the clerk of the court; if he fail, he may be compelled to do so by attachment, as for contempt. (Code, § 4847.)

BAILMENT

See *Common Carrier; Warehouse Receipts*

- § 1. Definitions
- § 2. Kinds of bailment
- § 3. Responsibility of bailee
- § 4. Lien of bailee
- § 5. Interest of bailee in goods

§ 1. **Definition.**—"Bailment," though not familiar to the public, yet it is of daily occurrence. It is from a word which means "to deliver", and is where personal property is delivered to another, as, where a horse or other property is loaned or hired to another, or property left with another for safe-keeping or repair or as a security or pledge, or property is delivered to a person or corporation as a public or private carrier, or is in the possession of an agent to sell or use, or even where one finds property or steals it (the delivery here being implied), or, generally, where a person is in the pos-

session of another's personal property. In every bailment, the identical property, though in an altered form, as, flour from wheat, is to be returned to the owner or delivered to a third person, according to agreement, express or implied; otherwise the transaction is either a sale, exchange, gift, or mortgage.

The owner is called the bailor, and the holder the bailee. (See 3 Min. Inst. 270-1.)

§ 2. Kinds of bailment.—Bailments are of three kinds: (1) For the sole benefit of the bailor, as, where anything is left for safe-keeping, without charge; (2) For the sole benefit of the bailee, as, where a horse or other thing is borrowed; (3) For the mutual benefit of both parties, as, where the bailment is for reward, or property is delivered for repair, or generally where the bailment is for pay. (See 3 Min. Inst. 271-2.)

§ 3. Responsibility of bailee.—His responsibility is determined by the degree of care he is required to exercise, whether ordinary, or greater or less than ordinary care, and his corresponding neglect, whether ordinary, gross, or slight; and these depend on the kind of bailment. If the bailment is for the benefit of both, the bailee is bound to only ordinary care and held for ordinary negligence; if for the bailor's sole benefit, the bailee is bound to only less or slight care, and held only for gross negligence; if for the bailee's sole benefit, he is held to greater or extraordinary care, and liable for slight neglect. "Ordinary neglect" is the omission of "ordinary care", or that care which every cautious and prudent man takes of his own goods. "Gross neglect" is the omission of "slight care" or that care which even a careless man takes of his own property. "Slight neglect" is the omission of "extraordinary care" or that care which a very cautious and prudent man takes of his own goods. But the rule as to innkeepers and common carriers of goods is different. (See 3 Min. Inst. 272-3.) See *Baggage; Common Carrier; Hotels*.

§ 4. Lien of bailee.—The bailee has a lien where the bailment is for hire, or where the property has by the bailee's labor or skill been improved or expenses have been incurred in its keeping. The lien is a personal one and cannot be transferred to another. The lien applies only to the identical

property, except where by custom or agreement it is made to apply to a general balance due to bailee for other work. The lien is lost or waived where the bailee parts with possession, takes other security, or treats the property as his own. See *Lien of Mechanics and Others*, sections 19-22.

At common law, the bailee can enforce his lien only by detention of the property, unless power of sale was given by agreement or custom. Perishable property, where the owner was unknown, could be sold. Now by statute (Code, § 6449), the lien of mechanics for repairs of personal property, boarding houses, keepers of livery stables and garages, persons pasturing horses or other animals, or keeping them or vehicles, or harness, and of "any bailee, except where otherwise provided, having a lien as such at common law on personal property in his possession which he has no power to sell for the satisfaction of the lien," may be enforced as provided in section 23, under *Liens of Mechanics and Others*.

§ 5. **Interest of bailee in goods.**— He has a special qualified property in them, which enables him, as well as the bailor, to sue for injury to or possession of the same. (3 Min. Inst. 295-6.)

BANKRUPTCY

(See various sections of the Bankruptcy Act as amended to date.)

- § 1. Object of national act
- § 2. Creditors to share equally; priority of liens
- § 3. Voluntary and involuntary bankruptcy
- § 4. Who may be a bankrupt
- § 5. What creditors may file petition
- § 6. Acts of bankruptcy
- § 7. Proceedings in bankruptcy
 - (1) Filing the petition
 - (2) Appointment of a receiver
 - (3) Adjudication in bankruptcy
 - (4) First meeting of creditors

- (5) Proof of debts filed by creditors
- (6) Application for discharge
- (7) Objections to discharge
- § 8. Referee in bankruptcy
- § 9. Proof of claims
- § 10. Priority of claims
- § 11. Compromise
- § 12. Duties of bankrupts
- § 13. Exemptions
- § 14. Discharge in bankruptcy
- § 15. What debts not released or discharged
- § 16. Costs and fees

§ 1. Object of national act.—The U. S. Bankruptcy Act of 1898, as amended 1903, 1906, and 1910, is of uniform application throughout the United States, and is intended to secure uniform administration of a failing debtor's estate, to prevent fraud upon and unfair and improper preferences to creditors, and to enable the debtor to become free and discharged of all his debts upon surrendering his property for the benefit of his creditors.

§ 2. Creditors to share equally; priority of liens.—Primarily, the law is for the benefit of creditors, securing to all creditors of the same class equal share in the assets of the debtor's estate; and to this end it is provided that all payment to creditors within four months prior to filing a petition in bankruptcy shall be returned by the creditors, if they knew or had reasonable cause to know that a preference was intended. But this does not apply where a creditor takes a deed of trust at the time the debt secured is incurred, but it does apply where the deed of trust is given to secure an already existing debt, or a lien is acquired by judicial procedure within that time. Liens acquired previous to the four months have priority. Also, liens given by the law independent of contract and of judicial proceedings, such as liens of inn-keepers, bailees, mechanic's liens, etc., hold their priority.

§ 3. Voluntary and involuntary bankruptcy.—Bankruptcy is voluntary where the debtor files a petition to be put into bankruptcy; involuntary where the petition is filed by creditors.

§ 4. Who may be a bankrupt.—Any person may file a voluntary petition; and any person, except wage earners earn-

ing \$1,500 or less a year, farmers, and tillers of the soil, may be put into bankruptcy on the petition of creditors, but in the latter case the debtor must owe at least a \$1,000. A wage earner is one who "works for wages, salary, or hire." A farmer is one whose chief business is farming. He may also run other business, as a store, or the like. If he leases his farm he is not a farmer. One's occupation at the time the act of bankruptcy is committed, and not at the time the petition is filed, controls.

Any corporation, except a city or town, or a railroad, insurance or banking corporation, may file a petition in bankruptcy; and any unincorporated company, or any moneyed, business, or commercial corporation, with the same exceptions, may be thrown into bankruptcy by its creditors, as trading and manufacturing corporations, printing and publishing houses, laundries, hotels, mining corporations, etc.; but not religious, charitable, or educational corporations, incorporated lodges, clubs, etc.

A minor or insane person cannot be a bankrupt.

A partnership, during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

§ 5. What creditors may file petition.— The creditors must have provable debts, i. e., debts due or to become due, aggregating, above securities, \$500; and if there are over twelve creditors, three must join in the petition, otherwise one is sufficient.

§ 6. Acts of bankruptcy.— When a debtor commits an act of bankruptcy he may be thrown into involuntary bankruptcy. The law provides that "Acts of bankruptcy of a person shall consist of his having:

(1) Conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or

(2) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or

(3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not

having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or

(4) Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property under the laws of a state, or of the United States; or

(5) Admitted in writing his inability to pay the debts and his willingness to be adjudged a bankrupt on that ground.

Insolvency is where one's property, including his exemptions but excluding property fraudulently transferred, is not sufficient to pay his debts.

The acts of bankruptcy must have been within four months prior to filing of petition.

§ 7. Proceedings in bankruptcy.— The several steps in regular order are as follows:

(1) *Filing the petition*, either by the debtor or the creditors, with schedule of creditors and assets, with the clerk of the U. S. District Court.

(2) *Appointment of a receiver*, where necessary, to take charge of the estate, pending the election of a trustee by the creditors.

(3) *Adjudication in bankruptcy*, i. e., the judgment of the court that the debtor is a bankrupt, which is entered as a matter of course at once, in case of voluntary bankruptcy. Judgment goes by default, unless the debtor resists it. He may defend that he ought not to be adjudged a bankrupt and is entitled to a trial.

(4) *First meeting of creditors*, at which they elect a trustee, and examine the bankrupt as to assets, if desired. The trustee gives bond and takes charge of the estate and administers it. None is necessary where there is no estate above exemptions.

(5) *Proof of debts filed by creditors*, which are allowed as a matter of course, if no objections are made.

(6) *Application for discharge*, when the estate is fully administered (see § 14, below.)

(7) *Objections to discharge*. Any creditor may file objections to the discharge of the bankrupt, setting up as a reason that he has violated some provisions of the bankruptcy

laws. If the court sustains the objection, a discharge is denied. See § 14, below.

§ 8. Referee in bankruptcy.—The case is at once sent by the U. S. District Court to the referee, who as a court hears and decides all questions of law and fact in relation to the property or the rights of the various parties, with the right of appeal, however, to court. The law makes detailed provisions for giving notice to all creditors, and other persons interested in the estate, of the pendency of the proceedings, the declaration and payment of dividends, and other matters, and provides methods whereby all persons interested may be heard on all subjects.

§ 9. Proof of claims.—Claims are proved by filing a sworn statement of the claim on a form provided for the purpose. If objections are made thereto, a trial is had.

§ 10. Priority of claims.—Claims are paid in the following order: (1) Taxes; (2) claims for the actual and necessary cost of preserving the estate after the petition was filed; (3) filing fees paid by creditors in voluntary cases, and expenses of reclaiming property concealed or fraudulently transferred; (4) cost of administering the estate, including fees and mileage paid to witnesses, one attorney's fee of a reasonable amount for the creditors, or for the bankrupt, in voluntary cases; (5) wages due workmen, clerks, traveling or city salesmen, earned within three months prior to filing of petition, not to exceed \$300 to each claimant; and (6) any debt having priority by the law of any State.

§ 11. Compromise.—A bankrupt may compromise or settle with his creditors by a proceeding known as "composition", whereby if he and a majority of his creditors agree upon some basis of settlement, the same, if approved by the court, becomes binding upon all creditors. The compromise cannot be offered until the debtor has furnished a full schedule of property and debts and submitted himself to a full examination under oath. He must deposit the compromise money with the court. The trustee, with the approval of the court, may compromise any controversy arising.

§ 12. Duties of Bankrupts.—The bankrupt must:

(1) Attend the first meeting of creditors, if required, and the hearing upon his application for discharge.

- (2) Comply with all the lawful orders of the court.
- (3) Examine proof of claims.
- (4) Execute and deliver papers ordered by court.
- (5) Execute transfers of property situate in foreign countries.
- (6) Inform trustee of attempts to prove false claims.
- (7) Prepare and file a schedule of his estate and debts—with his petition, if a voluntary bankrupt, but if an involuntary, within ten days after the adjudication, unless further time is granted by the court.
- (8) Submit to examinations and answer questions.

§ 13. **Exemptions.**—The bankrupt law provides that a bankrupt shall be entitled to those exemptions allowed by the law of his own state, which the trustee is to set off and turn over to him.

§ 14. **Discharge in bankruptcy.**—One may have gone into bankruptcy and yet not be able to plead the fact. It is important that he receives from the court a discharge. Pending bankruptcy proceedings, all other proceedings against the debtor are stayed for twelve months to see if he is discharged. The bankrupt must apply for his discharge within twelve months from the time he is adjudged a bankrupt. This time may, for good cause, be extended six months longer. The application for discharge is made by petition, giving the creditors ten days' notice by mail of the hearing for discharge. Any creditor may file objections to the discharge. He enters his appearance in writing by the time set, and files his objections ten days thereafter.

A discharge may be refused on any of the following grounds: (1) Commission of some offense against the bankruptcy act punishable by imprisonment (see section 29 of Act).

(2) Concealment, destruction of books or failure to keep books or records, with intent to conceal his financial condition.

(3) Making false statements in writing for the purpose of obtaining money.

(4) Making fraudulent conveyance within four months prior to filing petition in bankruptcy.

(5) Prior discharge within six years, in voluntary bankruptcy.

(6) Refusal to obey any lawful order or answer any material question approved by court.

§ 15. What debts not released or discharged.—The following debts are not released by a discharge in bankruptcy:

(1) Debts not provable, such as claims for personal torts and debts not owing prior to filing the petition.

(2) Taxes.

(3) Liabilities growing out of obtaining money by false pretenses.

(4) Liabilities growing out of wilful and malicious injuries to the person or property of another.

(5) Alimony due or to become due.

(6) Amounts owing for maintenance of wife or child.

(7) Liabilities for seduction and criminal conversation (or lewdness).

(8) Debts not duly scheduled in time for proof and allowance, unless the creditor had actual knowledge of the proceedings in time to prove his claim.

(9) Debts created by fraud, embezzlement, misappropriation or defalcation while acting as an officer or in the capacity of administrator or executor, guardian, committee, trustee, etc.

§ 16. Costs and fees.—The debtor must pay to the clerk of the court when the petition is filed, except where not required of a voluntary bankrupt, in full for all services, \$15 for the referee, \$5 for the trustee, and \$10 for the clerk, thus making the filing fee \$30.

The referee also receives 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, and one per cent. commission on all disbursements to creditors by the trustee, or in case of a compromise or "composition", one-half of one per cent.

The trustee, receiver, or marshal each also receives such commissions as may be allowed by the court, not over six per cent. on moneys in excess of \$500 and less than \$1,500; two per cent. on moneys in excess of \$1,500 and less than \$10,000; and one per cent. on moneys in excess of \$10,000; or in case of a compromise or "composition" not over one-half of one per cent. of the amount paid the creditors. In addition the marshal receives the same fees as in other cases.

BANKS AND BANKING

See *Corporations; Credit Unions; Negotiable Instruments; Interest and Usury; Loans Not over \$300*

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 - (4) Checking on bank—see *Checks*
 - (5) Taxation of banks—see *Taxation and Tax Bill*
 - (6) Where suits brought against banks—see *Corporations*, section 11
 - (7) On whom and how process or notice served on banks—see *Corporations*, section 12

- (8) Acknowledgments of writings by banks—see *Corporations*, section 14
- (9) Illegal circulation of currency or scrip
- (10) Rate of interest banks, etc., may charge
- (11) Other miscellaneous provisions

§ 1. Different kinds of banks and banking.—In Virginia we have:

(1) *Banks of discount and deposit* (Code, ch. 162), which discount paper and lend money on security, and receive money on deposit subject to check, or to be withdrawn in bulk in a certain time, the bank usually allowing 3 or 4 per cent. interest on such time deposits, or do the business of banks of exchange, which, instead of paying money back to depositors, make the payment by drafts on other banks, with whom they have arrangements, charging therefor a small fee (§ 4111).

(2) *Savings banks* (Code, ch. 162), which receive small sums of money on deposit, usually the earning of laborers, allowing them a small rate of interest.

(3) *Trust companies* (ch. 164), which (a) act as agent for a person, corporation, city or town, or state, for the collection or disbursement of interest or income or principal of securities; (b) act as the fiscal or transfer agent of any State, city or town, body politic or corporate, as to money, stocks, bonds and other evidences of debt, and act as agent of any corporation, foreign or domestic, for any lawful purpose; (c) act as trustee under a mortgage or bond, accept and execute any other city, town or corporate trust; (d) accept and execute trusts for married women; (e) act as guardian, receiver, or trustee of a minor, and as depository of any money paid into court for any one; (f) accept and execute trusts as to estates, and (g) all trusts and powers committed to them by any person, corporation, court or authority; (h) act as administrator, executor, guardian or committee, or trustee of a convict; (i) guarantee the fidelity and diligent performance of their trusts by persons or corporations holding places of private or public profit or trust in all cases where individual bonds are not required by law; by any person or corporation against loss or damage by reason or guarantee or become security (surety) on any bond given

of any risk, assumed by assuring the fidelity or diligent performance of duty of any person or corporation, or by guaranteeing or becoming surety on any bonds. (Code, § 4148, as amended by Acts 1920, p. 551.)

(4) *National banks*, which are organized under the Federal law (see 2, (1), below), and are now the only banks in Virginia which issue bank notes or bills of their own, as a circulating medium, instead of gold and silver.

(5) *Private banks*.—By act of January 1, 1910, private banks, i. e., those not incorporated, but organized and conducted by an individual or partners, are forbidden by law; but the law does not prevent a person, firm or corporation from lending on real estate and personal security, or collateral, or the guaranteeing the payment of bonds, notes, bills, or other obligations, or from purchasing or selling stocks and bonds (Code, § 4130). The State Corporation Commission has authority to examine the books and business of private concerns to see if a banking business is conducted contrary to law. (Code, §§ 4030-1.) It is a misdemeanor for any one not legally engaged in the banking business to conduct a banking business or to use the term "bank," "banker," "banking," "trust," or other words indicating a banking or trust company business, in an office-sign, letter-head, or otherwise. (Code, §§ 4131, 4136, 4698.) But by Acts of 1915, p. 232, as found in sections 77 and 78 of the Tax Bill, a "private banker" is defined by the act to be "any person or firm engaged in the business of receiving money on deposit, in lending or advancing money, or in negotiating loans on notes, bonds, furniture, or any class of security or securities, or in discounting, buying, or selling negotiable or other paper or credits, commonly known as street brokers, whether at an office kept for the purpose or elsewhere." He must obtain a license, under penalty of a fine of \$100 to \$500 for each offense; but this does not apply to a licensed attorney at law or land or real estate agent who negotiates loans upon real estate security. The license tax, when the capital is not over \$5,000, is \$50; not over \$10,000, \$100; not over \$20,000, \$150; no over \$30,000, \$2.50; over \$30,000, \$5 per \$1,000 for excess over \$30,000. (Tax Bill, §§ 77, 78.) See *Credit Unions*.

If a license tax is imposed "on the capital" alone, it is

not only a privilege tax, but no additional assessment can be imposed under section 8 of schedule C. (124 Va. 138.)

For bankers or brokers dealing in options or futures, see *Brokers*, section 7, (3).

For loans of not over \$300, made by bankers, see *Loans Not Over \$300*, section 10.

In modern banking, the functions of most of the above classes of banks are combined in each bank.

The banking business consists in dealing in money and credit, and the following are some of the branches of this business:

(1) *Collection*, where banks receive drafts or checks payable at different points, or undue notes, time drafts, and bills of exchange.

(2) *Discount*, or paying to the person the proceeds of a note or other paper not yet due, deducting the interest till maturity.

(3) *Loans*, which is quite a fruitful source of revenue to a bank.

(4) *Investments*, as, buying stocks or bonds for the interest they bear, and selling same at a profit. The chief object of a savings bank is the collective investment of small sums.

(5) *Agency*, or acting as financial agents for their customers, investing their money in various ways.

§ 2. National banks.—(1) *How organized*.—Five or more persons unite to form a national bank. They provide for a capital stock and secure subscriptions thereto in amounts as follows: In cities over 50,000 persons, \$200,000 or more; in cities of 6,000 to 50,000 persons, \$100,000 or more; in cities of 3,000 to 6,000 persons, \$25,000 or more, provided the Secretary of the Treasury approves thereof, otherwise \$100,000. One-half the capital stock must be paid; the remainder to be paid in instalments of at least 10 per cent. each month after being authorized to commence business. The stock must be divided into shares of \$100 each, which are transferable on the books of the bank. The organizers sign a certificate of organization, which must contain:

(a) The name (subject to the Comptroller's approval).

(b) The city, town, or village, the county, and the State

or territory where its operations of discount and deposit are to be carried on.

(c) Amount of capital stock and number of shares.

(d) Names and places of residence of the shareholders and the number of shares held by each of them.

(e) The fact that the certificate is made to comply with the National Banking Law.

The certificate must be acknowledged before a judge or notary public and forwarded to the Comptroller of the currency, at Washington, D. C., who, upon examining the same and finding it in due form, authorizes the bank to do business as a national bank.

(2) *How state bank becomes a national bank.*—The Federal law provides that a state bank may become a national bank by making articles of association and certificate of organization as above recited, except it shall declare that two-thirds of the owners of the capital stock have authorized the directors to make the certificate; the shares to be for the same amount as before the change. The certificate may be executed by a majority of the members. After organization the bank shall have the same powers and privileges and be subject to the same duties, responsibilities and rules as other national banks. The same amount of capital stock is required as of other national banks.

(3) *Directors and officers of national bank.*—The stockholders elect at least five directors, who each must own at least ten shares of the capital stock. The directors elect the president, vice presidents, and cashier, the latter being the executive officer of the bank, and he may be assisted by a paying teller, receiving teller, note teller, discount clerk, collection clerk, bookkeepers, check clerks, messengers, etc., or such of them as may be needed for the purposes of the particular bank.

(4) *Safety of national banks.*—As a national bank can issue bank notes only to an amount equal to the par value of the government bonds, which the bank has deposited in the U. S. Treasury to secure their payment, it is impossible for a holder of national bank notes to suffer any loss by reason of the bank's suspension or failure. To insure safety of deposits in national banks, the Federal law provides for a rigid system

of periodic inspections by bank examiners. Furthermore, in addition to the amount paid in on his stock, each stockholder is personally liable to creditors of the bank for his pro rata share in a sum not exceeding the par value of his shares of stock. Thus, if he has ten shares, he is not only liable to the bank to pay in \$1,000, but is liable to creditors, in case of insolvency, for his pro rata amount up to \$1,000.

(5) *Holding real estate by national banks.*—The National Bank Act provides that a national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: “(a) Such as shall be necessary for its immediate accommodation in the transaction of business; (b) such as shall be mortgaged to it in good faith by way of security for debts previously contracted (“previously” is omitted as to state banks—see section 4 (8), below); (c) such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; (d) such as it shall purchase at sales under judgment, decrees, or mortgages held by the association or shall purchase to secure debts due it. But no such association shall hold the possession of any such real estate under mortgage, or the title and possession of real estate purchased to secure any debts due it, for a longer period than five years.”

So a national bank cannot loan money on real estate, while a state bank may—see section 5, (5), below. But as between the parties, the mortgage is good. The government, however, may complain. National banks may act as fiduciaries like trust companies. (Code, § 4149.)

§ 3. How banks organized in Virginia; costs.—They are organized like private corporations in general (Code, § 4098)—see *Corporations*, section 4; for costs, see section 5.

Banks cannot be chartered with less than \$25,000 (\$15,000 in place of 2,000 or less; and trust companies \$100,000), capital stock, and subscriptions must be paid in money at not less than par, and at least the minimum must be subscribed, and one-half of each subscription (\$100,000 in the case of trust companies), paid in before commencing business, and all within a year. (Code, § 4099, as amended by Acts 1920, p. 819; § 4100, as amended by Acts 1922; § 4146.)

Before a bank commences to receive deposits, it must re-

ceive its certificate from the State Corporation Commission, prior to issuing which the Commission, through its chief bank examiner, makes a thorough investigation to see if all the provisions of the law have been complied with and that the necessary capital stock has been subscribed and paid in cash and that the oaths of all the directors have been taken and filed according to law. Within ten days after the receipt of the certificate, the bank must publish the certificate in a local or the nearest newspaper for two weeks. Proof of such publication must be filed with the State Corporation Commission. A violation hereof is punishable by a fine from \$25 to \$100. (Code, § 4105, as amended by Acts 1922.)

§ 4. General provisions applicable to banks.—They are subject to the general duties and restrictions, and have all the general powers contained in the general provisions of the Code as to corporations (Code, § 3776-3848, and Acts 1920, pp. 489, 494, 565, amending §§ 3780, 3846, 3847, respectively), unless otherwise provided in the special chapters 162-4, as to banks and trust companies or are in conflict with existing charters of banks. (Code, §4098; § 4129, as amended by Acts 1920, p. 825; §§ 4137, 4145, as amended by Acts 1922.)

§ 5. Special provisions applicable to banks.—(1) *General powers.*—They may adopt a common seal, make contracts, sue and be sued, elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them, or dismiss them at pleasure. (Code, § 4103.)

A state bank in Virginia cannot do business out of the State, nor can a state bank of another state do business here. (Code, § 4130.)

Neither can a bank do business in more than one place, but a bank having a paid up and unimpaired capital stock of \$25,000 or more may, by authority of the State Corporation Commission, establish branches, which must bear only the name of the home bank. (Code, § 4101-2.)

For limitation of amount to be invested in building, see Code, § 4104, as amended by Acts 1922.

(2) *By-laws.*—The board of directors may prescribe by-laws not inconsistent with state or national laws, regulating the manner of transferring stock, the general business of

the bank, and the privileges granted it by law. They may be altered or repealed by the stockholders at any annual or general meeting. (Code, § 4106.)

(3) *Directors.*—There must be at least five directors, a majority of whom must be citizens of Virginia. Their number may be increased at any annual meeting of the stockholders. (Code, § 4107.) They must hold at least \$100 worth of stock. (Code, § 4116, as amended by Acts 1922.) Each director must take the oath prescribed by section 4117 of the Code, as amended by Acts 1922. A director must not knowingly purchase or discount at higher rate of interest any note or bill refused by the bank. (Code, § 4108.)

The directors, at their first meeting after their election, must elect a president from their number, and such other officers as may be prescribed by the by-laws. The board of directors must hold a meeting at least monthly. (Code, § 4109, as amended by Acts 1922.)

They shall at least twice a year cause an examination to be made of the moneys of the bank, and a settlement to be made of the accounts of the cashier, a statement of which examination and settlement to be recorded with the proceedings of the board. (Code, § 4110, as amended by Acts 1920, p. 820.)

(4) *Kinds of business bank may do.*—A bank may, subject to law, do all things necessary to carry on the business of banking, by discounting and negotiating paper, receiving deposits, buying and selling exchange, coin and bullion, loaning money on real estate and personal security, or collateral, guaranteeing the payment of bonds, bills, notes, and other obligations, re-discounting paper, and in purchasing and selling all stocks and bonds. They may use deposits and other funds, but must maintain a reserve of at least 10 per cent. of its demand-deposits, and at least 3 per cent. of its time-deposits. (Code, §§ 4112, 4113, as amended by Acts 1920, p. 820.)

(5) *Holding real estate.*—A bank may “purchase, hold and convey real estate, for the following purposes, and none other: (1) Such as is necessary for its immediate accommodation in the transaction of its business; (2) such as is mortgaged or otherwise encumbered to it in good faith, by way

of security for debts contracted ('previously' contracted, says the Federal Act). (3) Such as is conveyed to it in satisfaction of debts previously contracted in the course of its dealings; (4) such as it shall purchase at sales under judgments, decrees, mortgages, or deeds of trust held by it, or purchased to secure debts due to it." But no bank shall hold the possession of any real estate as security for longer than fifteen years. (Code, § 4114. See section 2 (5) above.) If the above is violated, the bank may forfeit its charter. A third party can derive no advantage from it. (98 Va. 530.)

A bank capable of receiving deposits cannot invest in a bank building an amount greater than its paid in capital stock undiminished by losses. (Code, § 4104.)

(6) *No loan on stock until paid for.*—The bank must not make a loan to a stockholder until his shares are paid for in cash. (Code, § 4115.)

(7) *Greatest amount one person may borrow.*—No person, firm (including all partners, except special partners), or corporation, is allowed to borrow more than one-fourth of the capital and permanent surplus of a bank, unless authorized by a signed resolution of a majority of the directors, recorded in the minutes; but this does not apply to discounting and negotiating in good faith bills of exchange and commercial or business paper. (Code, § 4115.)

(8) *Surplus; dividends; undivided profits.*—A dividend may be declared of the net surplus above all expenses, losses, interest and taxes; but the capital must first be paid in full, and the entire net profits must be set aside as a surplus fund until the fund amounts to 10 per cent. of the capital stock. Any losses in excess of net undivided profits may be charged to the surplus fund, but the fund must afterwards be reimbursed from the earnings, and no dividend is to be declared or paid until the surplus fund is fully restored. (Code, § 4119.)

(9) *Reports to State Corporation Commission.*—State banks are required to make annual statements to the State Corporation Commission, like national banks are required to make to the Comptroller of Currency, in accordance with forms prescribed. (Code, § 4120.)

(10) *Safety of state banks.*—Besides the strict oversight

of state banks by the State Corporation Commission, to whom they are required to make full and explicit sworn reports, which in condensed form are required to be published within 15 days in the local paper, the commission, without previous notice, causes each bank to be examined at least once every year, and provision is made for special examinations on request of the directors, or stockholders representing two-fifths of the capital stocks, and of closing the doors of the bank, or putting it into the hands of receivers, when thought advisable. (Code, § 4120.)

(11) *Insolvent bank not to receive deposits.*—It is a felony for a bank or banking institution to receive deposits, when knowing the bank's insolvency. (Code, § 4124.)

(12) *Inspection of banks by General Assembly.*—This may be done at any time, by a joint committee, a committee of either house, or one or more commissioners appointed by the body. (Code, § 4133.)

(13) *General Assembly may repeal charters or modify laws.*—See Code, § 4134.

(14) *State banks may be members of Federal Reserve Bank System.*—See Code, § 4135.

(15) *Special provisions as to savings banks.*—The directors may receive money on deposit and grant certificate therefor; but no certificate is to be for less than \$1.00, and it may buy, sell, draw, or negotiate bills of exchange. The payment of a certificate of deposit may be enforced by warrant or motion with 10 per cent. interest on whole amount due. Their funds may be invested in or loaned on stocks or real estate, or be used in purchasing or discounting bonds, bills, notes, or other paper; but no due paper, other than Federal, state, or corporation bonds, shall be purchased at less than the full value thereof, and no paper not due, other than such bonds, shall be bought or discounted at more than one-half of one per cent. per annum, but the interest may be received in advance. (Code, §§ 4141-3.)

The capital stock of any such bank may be increased from time to time to the maximum prescribed in its charter. (Code, § 4144.)

§ 6. Miscellaneous provisions as to banks.—(1) *Why you should have a bank account.*—A modern business man can

scarcely do business without a bank account. The following are some of the reasons why a person should have an account with some bank: (1) Because there his money is safely kept. (2) It is a time-saver and convenient, for when you receive money you can deposit it in bank, and when you pay it out you can draw checks for the amount. A check is the cheapest way to send money. (3) He can leave his notes with the bank for collection, and so is relieved of giving notice to endorsers. (4) He can make his own notes and bills payable at his own bank. (5) In counting money, one runs a risk of making a mistake, which he avoids when he draws a check. Banks seldom make a mistake; if they do, it is either detected by them in footing up their accounts, or is discovered by you on comparison of the paid checks returned and your check stubs, in connection with the bank's monthly statement to you. (6) A bank account is useful when a payment is disputed, and is a valuable record of your income and expenditure. (7) If you do business with a bank, they will more readily loan you money, renew and carry your notes, and accommodate you in various ways. (8) To have bank connection, puts you in touch with the business affairs of the community, and educates you to a broader idea of business, and business methods. (9) A bank connection also gives you the benefit of the bank's experience, knowledge, and advice pertaining to investments and other matters.

(2) *How to open a bank account.*—Get some one to introduce you to the cashier, who will have you to sign your name in the "Signature Book," so it will be recognized when signed to your checks. You then make your deposit, and the bank gives you a deposit, bank, or pass book, as it is variously called, or a bunch of deposit tickets or blanks, and also furnishes you check book.

(3) *Deposits.*—A deposit, subject to check is a general deposit. A special deposit is where the same identical funds are to be returned. Where the deposit is made for a particular purpose, it is called a special deposit.

Where money is deposited, subject to check, the depositor receives a "deposit ticket," signed by the cashier, or, it is entered in the deposit, pass, or bank book. If the deposit is made for safekeeping, or for interest, the money to be re-

turned on call or at a stated time, a "certificate of deposit" is given the depositor, which may be transferred like negotiable paper.

The bank has a lien upon deposits for the depositor's overdrafts or other indebtedness.

If a depositor makes a note payable at bank, the bank may, it seems, pay the same out of his deposits.

A bank may transfer a deposit of a person who has died (after two weeks from his death), or of an infant or lunatic, to his administrator, executor, guardian, curator, or committee, upon presentation of a court letter or certificate showing his qualification. When the amount of a deceased person does not exceed \$300, and there is no administrator or executor, a bank or an employer may, after 120 days, pay the money to his next of kin, who receipts therefor. Until notice of such death and two weeks thereafter, the bank may pay checks of such deceased person. (Code, § 4125, as amended by Acts 1920, p. 21—merely correcting a printer's out; and Acts 1922.)

A minor may deposit his money in bank and check on it or receive it back and receipt therefor, like any other person. (Code, § 4126.)

A deposit under the names of two or more persons, payable to either, or to either survivor, may be paid to either, whether the other be living or not, and his receipt is a sufficient discharge for the bank. (Code, § 4127.)

Where a safety deposit box is under the name of two or more, with right of access to either or the survivor, either may move the contents. (Code, § 4128.)

The board of directors of trust companies may prescribe conditions for making and withdrawing deposits. (Code, § 4147.)

For limitation for recovery of deposits, see § 5810.

(4) *Checking on bank.*—See *Checks*.

(5) *Taxation of banks.*—See *Taxation and Tax Bill*.

(6) *Where suits brought against banks.*—See *Corporations*, section 11.

(7) *On whom and how process or notice served on banks.*—See *Corporations*, section 12.

(8) *Acknowledgments of writings by banks.*—See *Corporations*, section 14.

(9) *Illegal circulation of currency or script.*—Issuing or passing notes, script, or other writings, as currency, without authority of law, is a misdemeanor. (Code, §§ 4136, 4698, 4704.)

And such and all contracts as securities for such dealings are void, etc. (Code, §§ 4150-3.)

(10) *Rate of interest banks, etc., may charge.*—A licensed banker or broker, or any corporation authorized by law to make loans, or to purchase or discount bills, notes, or other paper, may loan money or discount such paper at not over one-half of one per cent. for 30 days (i. e., 6 per cent for 360 days), and may charge a minimum loan or discount fee of 50 cents on loans or discounts for 30 days or more, and may receive such interest in advance. (Code, § 5553; see *Interest and Usury*.)

Under the "small loan law," a banker may charge 3½ per cent. for 30 days (or 42 per cent. per annum!) on loans over \$50 and not over \$300, or 5 per cent. for 30 days (or 60 per cent. per annum!), where the loans are not secured in real estate by mortgage or deed of trust. See *Loans Not Over \$300*, section 10.

Or, as a broker, he may charge brokerage for negotiating or obtaining loans upon real estate security. See *Brokers*, section 7, (2).

(11) *Other miscellaneous provisions.*—See § 1484 (how often weights and measures proved and sealed; § 1485 (tender of gold weighed with weights not sealed); §§ 2157, 4120 (as State depositories); § 2165 (payments to State Treasury by checks and certificates of deposit); § 5348 (transfer to foreign personal representative of capital shares of stock); § 2223 (failing to furnish statement to examiners of records); § 4610 (penalty for handling drafts in payment for intoxicating liquors); § 4430 (punishment for breaking or entering); § 4438 (punishment for burning or destroying); Acts 1918, p. 121 (as to public holidays, § 5758, adding Jefferson Davis day); Acts 1918, p. 430, and Acts 1919, p. 129 (providing for the disposition of old deposits or accounts).

BASTARDS

- § 1. Definition
- § 2. As to support of bastards
- § 3. Custody of bastards
- § 4. As to bastards inheriting property

§ 1. Definition.— At common law, a bastard was one begotten and born out of lawful wedlock, or in wedlock, but owing to the absence of the husband or otherwise it was impossible for him to be its father; but by statute in Virginia, the following persons (bastards at common law) have been declared legitimate: (1) Where the child is born out of wedlock but the parents afterwards marry, and is before or after marriage recognized by the father (Code, § 5269); (2) where the marriage is declared illegal or is dissolved (Code, § 5270).

§ 2. As to support of bastards.— The law requiring a putative father to support his bastard child, was repealed in 1874.

§ 3. Custody of bastards.— The mother is the natural guardian of her bastard child, and is entitled primarily to its care and custody.

§ 4. As to bastard inheriting property.— By statute, bastards are "capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten. And the children of parents one or both of whom were slaves at and during the period of cohabitation, and who were recognized by the father as his children, and whose mother was recognized by such father as his wife, and was cohabitated with as such, and their descendants, shall be as capable of inheriting any estate, whereof such father may have died seized or possessed, or to which he was entitled, as though such children had been born in lawful wedlock". (Code, § 5268.) In other cases, a bastard cannot inherit from the father.

BEES

If bees leave the owner's hive, he continues to own them as long as he can keep them in sight and identify them, even though they settle on a tree on another's land. As between the owner of land and a stranger, bees and their honey found thereon, belong to the owner of the land. (3 Min. Inst. 8.)

BEGGING

See *Vagrants*

An overseer of the poor, or the sergeant or other proper officer of a town that provides for its own poor, must prevent a person from going about begging or staying in any street or other place to beg; after notice thereof, the officer is liable to a fine of \$10, recoverable by motion, after ten days' notice, before a justice, one-half going to the informer. Such beggar must be sent to the poorhouse, or to be removed to his proper county, town, or state. (Code, § 2804.)

BENEVOLENT ASSOCIATIONS

- § 1. How charter for obtained
- § 2. Conveyance, trustees, and suits
- § 3. Exemption of property from taxation
- § 4. Suits by and against unincorporated associations or orders

§ 1. **How charter for obtained.**—See *Corporations*, section 4, 5th class.

§ 2. **Conveyance, trustees, and suits.**—By section 47 of the Code: "When any conveyance of land has been or shall be made to trustees for the use of any society of Freemasons,

Odd Fellows, Sons of Temperance, or any other benevolent or literary association, or school league, or if without the intervention of trustees such conveyance has been made since the thirty-first day of March, 1848, or shall be hereafter made for such use, sections 39, 42, 45, and 46 (as to trustees and suits—see sections 4 and 6, under *Church and Church Property*), shall be construed as if they were expressly made applicable to such association.”

The trustees cannot take or hold for such association over 2 acres, nor for any other use than as a place of meeting and for the education and maintenance of children charitably provided for by them; except that a school may in addition to the 2 acres held by the trustees, hold not over 10 acres as a home for the principal of the school for which the league is named. (Code, § 48.) Such association may acquire books or furniture, and trustees may be appointed therefor. (Code, § 49.)

§ 3. Exemptions of property from taxation.— Real and personal property used exclusively for lodge purposes or meeting rooms, with adjacent land necessary for the convenient use of the buildings for such purposes, are exempt from taxation. (Va. Const. § 183; Code, §§ 2272, 2301.)

§ 4. Suits by and against unincorporated associations or orders.—See *Suits and Actions*, section 3.

BICYCLES

- § 1. How to pass person on road
- § 2. Riding bicycles or motor cycle on sidewalk
- § 3. Motor vehicles—see *Automobile Law*

§ 1. How to pass person on road.— A person riding a bicycle, on meeting or overtaking a vehicle or wagon or person on horseback, must use all proper care in passing to prevent frightening the horses, and if they appear to be frightened, he shall dismount and stop, in order to prevent accident from such fright. If he fail to do so, he may be fined

\$2 to \$5, and is liable for all damages resulting from his neglect or want of proper care. (Code, § 4736.)

§ 2. Riding bicycle or motor cycle on sidewalk. To use or ride a bicycle or motor cycle upon a sidewalk along a highway through an unincorporated town or village, is forbidden under penalty of a fine from \$5 to \$25. (Code, § 4733.)

§ 3. Motor vehicles.— See *Automobile Law*.

BIGAMY

§ 1. Definition

§ 2. Punishment

§ 3. Form of "description" in warrant or indictment

§ 1. Definition.— Bigamy is where a person, being already married, marries, during the life of the former husband or wife, another person in this State, or if the marriage with such other person take place out of the State, he thereafter cohabits with such other person in the State; but this does not apply, (1) where the former spouse has been continually absent for seven years and not known to be living during that time; (2) nor to a person who can show that the second marriage was contracted in good faith under a reasonable belief that the former consort was dead; nor (3) where a person has been divorced from the bond of the former marriage; nor (4) where the former marriage was void (Code, §§ 4538-9). "Being married" means legally married, and does not apply where the first marriage is bigamous, or where a white person and a negro are married, or where the husband is under fourteen and the wife under twelve years of age, and they separate and do not cohabit together, or other case in which the marriage is absolutely void (Code, §§ 4538, 5087-90).

"Marry another person" means to go through a form of marriage, recognized by the law as binding.

If after seven years absence, the truant Enoch Arden should return, he has priority over the one acting in his stead during his absence, should he care to assert his rights.

§ 2. Punishment.—The punishment of bigamy is penitentiary from 3 to 8 years. (Code, § 4538.)

§ 3. Form of "description" in warrant or indictment.

No. 1. BIGAMY WHERE THE SECOND MARRIAGE IS IN THE STATE.

(Code, §§ 4538-9.)

DESCRIPTION:

"did feloniously marry and take to wife one M. S., he the said C. D. having before married and taken to wife one, N. O., who, at the time of such marriage of the said C. D. and M. S., was the lawful wife of the said C. D. and was then living."

No. 2. BIGAMY WHERE THE SECOND MARRIAGE IS WITHOUT, AND THERE IS COHABITATION WITHIN, THE STATE.

(*Idem.*)

DESCRIPTION:

"did feloniously cohabit and live with one M. S., whom he had before feloniously married and taken to wife in the state of North Carolina, he the said C. D., before such marriage with the said M. S., having married and taken to wife one N. O., who, at the time of such marriage of the said C. D. and M. S., was the lawful wife of the said C. D. and was then living."

BILL OF LADING

§ 1. Definitions

§ 2. When a transfer of bill of lading is a transfer of the goods

§ 3. Two kinds of bills of lading

§ 1. Definition.—A bill of lading is a receipt (issued in duplicate, upon request) from a transportation company for goods to be shipped to some given destination, showing the name of the shipper, called the consignor, and the name of the person to whom the goods are sent, called the consignee, the character or kinds of goods, their class of freight, their weight, and the rate charged for their transportation, in which is also incorporated the contract between the parties as to the liability of the company, etc. So it is both a receipt and a contract. (See Code, §§ 3915, 3917, 3926, 3929.)

§ 2. When a transfer of bill of lading is a transfer of the goods.—The bill of lading represents the goods, and a transfer or assignment of it by the shipper by indorsement, is a transfer of the title to the goods, so long as they are being shipped; but the assignee takes subject to such prior liens as may be against the goods. But the mere fact of shipment, or consignment, as it is called, does not vest an absolute title in the consignee; his title is not complete until the bill of lading comes into his hands. If the bill of lading makes the goods deliverable to the shipper's order the title *prima facie* does not pass to the consignee, especially the title does not pass where the shipper attaches a sight draft, or where a draft is drawn on the consignee, which is discounted at bank, at least not until the draft is accepted or paid. Where a sight draft is attached, the consignment is made to the shipper himself, with instructions to deliver the goods to the purchaser upon payment of the draft, and presentation of the bill of lading, properly indorsed.

The shipper may in case of the purchaser's insolvency, stop the goods while being shipped, provided it is done before the bill of lading is transferred to a *bona fide* purchaser. (See various common law authorities.)

§ 3. Two kinds of bills of lading.—There are two kinds of bills of lading, (1) a "straight bill", which reads, "consigned to", and (2) an "order bill," which reads, "consigned to order of," and has this clause: "The surrender of this original order bill of lading properly endorsed shall be required before the delivery of the property." The "order bill," by the Uniform Bills of Lading Act in several states, but not in Virginia as yet, is made negotiable, and there is much law in respect thereto, contained in said act.

BILL OF REVIEW

For statute as to, see Code, §§ 6095, 6816, 6387, 6395.

BILL OF SALE

See Conditional Sale, or Reservation Title or Lien

- § 1. Definition of bill of sale
- § 2. When bill of sale necessary
- § 3. Useful forms under "Bill of Sale"

§ 1. Definition of bill of sale.—A bill of sale is a writing usually under seal, by which one person transfers his right to or interest in personal property to another. In most instances, however, such transfer is made by delivery of possession without a writing. A transfer of real estate is made by what is usually called a "deed," while that of personal property, "a bill of sale."

§ 2. When bill of sale necessary.—Where it is desired to know precisely the several items sold there should be a memorandum thereof, and where any question as to title may be raised by a creditor or other third person, it would be well to have the sale in writing and recorded. By section 5192 of the Code, it is provided that "every bill of sale or contract for the sale of goods and chattels when the possession is allowed to remain with the seller, shall be void, both at law or in equity, as to purchasers for value and without notice to creditors"; but by section 5193, if such bill of sale be recorded it is, as against creditors and purchasers, as valid, "as if possession had completely passed at the time of such admission to record;" and section 5194 as amended by Acts 1922 provides that a bill of sale on a contract for the sale of goods and chattels, where the possession is allowed to remain with the grantor, "shall be void as to all purchasers not parties thereto, and lien creditors, until and except from the time it is duly admitted to record and indexed."

A "purchaser" here is not only one who has bought, but one who has obtained a lien by contract, as, a deed of trust. a reservation lien, crop lien, and the like; and a "creditor" under sections 5192-3, above, is not one in the popular sense, or a "general creditor," but one having a lien imposed by law, as, an execution, attachment, and the like (M's. Real Prop.,

§§ 1171-2, 1404, 1406) ; but under section 5194, above, he is a general or lien creditor.

As to gifts of personal property, they are void, even as between the parties, unless by deed or will, or unless possession passes, and where the parties reside together, possession thereof is not sufficient, but a deed or will is necessary. (Code, § 5142.) Of course, as against existing creditors a gift is fraudulent and void, and "creditors" is here used in the popular and lien sense. See *Gifts of Personal Property*, and *Fraudulent and Voluntary Conveyances*.

§ 3. Useful forms under "Bill of Sale."

No. 1. BILL OF SALE.

(Code, § 5194.)

Know all men by these presents, that I, C. C., of -----, in consideration of the sum of ----- dollars to me in hand paid by D. D., of -----, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby bargain, sell, assign, and deliver unto the said D. D. the goods and chattels following, namely, (describe the particulars of the goods sold). To have and to hold the said goods and chattels unto the said D. D., and his assigns forever. And I, the said C. C., for myself and my heirs, do covenant with the said D. D., and his assigns, that the said goods and chattels are sound, and of good merchantable quality (state the warranty of quality as it was made); and further, that I will warrant the title to the said goods and chattels to the said D. D., and his assigns forever, free from the claims of all persons whatsoever.

Witness my hand and seal, this, the ---- day of -----, 192---

C. C. (SEAL.)

BILLS OF EXCHANGE, OR DRAFTS

- § 1. Definition
- § 2. Different from a mere order
- § 3. Kinds of bills of exchange
- § 4. Bills in a set
- § 5. Acceptance, presentment, protest, payment, etc
- § 6. Use and convenience of drafts
- § 7. Fraudulent use of drafts—see *Checks*, section 7
- § 8. Forms under "Bills of Exchange"

§ 1. **Definition.**—A bill of exchange, commonly called "a draft," is an order drawn by one person called the drawer,

in favor of another person, called the payee, upon a third, called the drawee, and if he accepts it, he is called the acceptor. Technically, "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer" (Code, § 5688), and this includes a "sight draft." It may be addressed to two or more drawers jointly, but not successively (Code, § 5690). They are used to adjust accounts or draw credit from one place to another without the actual transfer of funds. "A check is a bill of exchange drawn on a bank, payable on demand" (Code, § 5747)—see *Checks*.

A bank draft is a bill of exchange payable on demand, drawn by one banker or bank upon another to the order of a person named therein.

§ 2. Different from a mere order.—If the order is conditional, or no time of payment is fixed, or is payable out of a particular fund, or is not payable to order or bearer, it is not a bill of exchange, and is not negotiable. A bill of exchange does not operate as an assignment of funds in the hands of the drawee (Code, § 5689; see 122 Va. 10; 102 Va. 753.) But where an order is drawn upon a particular fund it does operate as an assignment. See *Assignment*.

§ 3. Kinds of bill of exchange.—There are two kinds, inland and foreign; inland, where the bill "is or on its face purports to be, both drawn and payable within this State; any other bill is a foreign bill. Unless the contrary appears on its face, it is treated as an inland bill. (Code, § 5691.)

§ 4. Bills in a set.—Sometimes, especially in the case of foreign bills, in order to secure prompt arrival, bills are drawn in sets, usually three, similarly drawn, numbered one, two, and three and referring to each other. The three parts constitute but one bill. The drawee accepts the first one received. For the law as to bills in a set, see Code, §§ 5740-5.

§ 5. Acceptance, presentment, protest, payment, etc.—For the law, as to acceptance, presentment for acceptance, protest, acceptance for honor, and payment for honor, see Code, §§ 5694, etc. See also, *Negotiable Instruments*. Protest of an inland bill is not necessary in order to hold the

drawer and indorsers (Code, § 5714); but it is convenient to prove dishonor, and notice to endorsers.

§ 6. Use and convenience of drafts.—Bills of exchange, or drafts, are drawn by merchants upon each other to raise money, or collect or settle accounts. For instance, a merchant shipping a large quantity of goods to another to sell on commission, usually draws a draft on the party for a part of the cost, and sells it at bank, or passes it to another merchant in the course of business by indorsement. This is called a mercantile draft to distinguish it from a bank draft, which is called "exchange". Oftentimes the shipper desires a portion or all the money on delivery of the goods. In this case, he attaches to the bill of lading a sight draft, and deposits the same in his home bank for collection, who collects it through a bank where the drawee lives or does business. The shipper should notify the drawee by mail, so he may be prepared to pay the draft when it arrives. A draft may also be drawn payable so many days after date. Sight or time drafts may likewise be attached to other papers.

§ 7. Fraudulent use of drafts.—See *Checks*, section 7.

§ 8. Forms under "Bills of Exchange."

NO. 1. INLAND BILL OF EXCHANGE.

Driver, Va., Nov. 12, 1921.

\$500.

At sight (or----- *days after sight*, or as the case may be), pay to B. C. (or *B. C. or order*, or to *B. C. or bearer*, or to *bearer*), five hundred dollars, value received, and charge to the account of

To Mr. A. P., Pulaski, Va.

S. N.

NO. 2. FOREIGN BILL OF EXCHANGE.

Capron, Va., July 21, 1921.

\$500.

At sight (or ----- *days after sight*, or as the case may be), of this my first exchange (second and third of same date and tenor not paid), pay to J. L. (or to *J. L. or order*, or to *J. L. or bearer*, or to *bearer*), five hundred dollars, value received, and charge to the account of

To Mrs. S. D., Dallas, Texas.

S. N.

No. 3. FORM OF PROTEST.

Know all men, that I, N. P., a notary public in and for the county (or city) of _____, on the _____ day of _____, 192___, at the usual place of abode of S. D., the drawee of the bill of exchange, of which the above is a copy, did present the same and demand payment thereof, and the said Mrs. S. D. did not pay (or "accept") the said bill of exchange, wherefore the same is hereby protested.

Dated this _____ day of _____, 192___

Notary's fee, \$-----

N. P., N. P.

BIRTHS AND DEATHS

We have in Virginia a comprehensive act (under the head of "Vital Statistics," in the Code), providing for the immediate registration of all births and deaths throughout the State, by means of certificates of births and deaths, and burial or removal permits; requiring prompt returns to the bureau of vital statistics at the capital of the State, as required to be established by the State Board of Health; and insuring the thorough organization and efficiency of the registration of vital statistics throughout the State. For this purpose the State Board of Health has charge of the registrations, the Health Commissioner is State Registrar, each city, town and magisterial district is a registration district, for which the principal officer of the local board of health of the cities and towns are registrars there, and the justices registrars in their several districts, and the justices may, upon request of the State Registrar, appoint sub-registrars. They make monthly reports to the State Registrar, and receive 25 cents for each birth or death certificate registered with them, or for each report made, if there be no birth or death. (Code, §§ 1561-84; and Acts 1918, p. 111, amending §§ 1575, 1578, 1580.)

BLACKMAILING

To threaten injury to the character, person, or property of another, or to accuse him of an offense, and thereby extort

money, property, or pecuniary benefit, or any note, bond, or other evidence of debt, from him or any other person, is punishable by penitentiary from 3 to 5 years, or jail not over one year and fine not over \$1,000. (Code, § 4406.)

An attempt thus to extort money, etc., is a misdemeanor under the common law of Virginia, punishable by fine not over \$500 or imprisonment not over 12 months, or both. (Code, § 4782.)

To seize, take, or secrete any person, whether minor or adult, with intent to extort money, or pecuniary benefit, is punishable by penitentiary from 8 to 18 years. (Code, § 4407.)

BLASPHEMY

Blasphemy is a common law misdemeanor in Virginia, punishable by a fine not over \$500 or imprisonment not over 12 months or both. (Code, § 4782). Blasphemy is any disrespectful reproaches of Jesus Christ, profane scoffing at the existence or providence of God, or at the Bible, or in general, whatever casts reproach upon God and religion, and so tends to subvert society and to shock and wound the feelings and moral sense of the community. And this is not contrary to one's right "to profess and by argument to maintain" any religious opinion (Code, § 34); for it is not argument and becoming discussion, but profane and impious railing that offends against morality and decency, as well as against religion. (H's G. & M., p. 432.)

Also, it is a misdemeanor, punishable by a fine of \$1.00, for a person arrived at the age of discretion profanely to curse and swear. (Code, § 4568.)

BOARDING AND EATING HOUSES

See Hotels; Intoxicating Liquors

- § 1. Definition of boarding house or "house of private entertainment"; license
- § 2. Definition of eating house or restaurant; license
- § 3. "Beating" board bills, and punishment—see *Hotels*, section 5
- § 4. Lien of boarding house, and enforcement of same—see *Liens of Mechanics and Others*, sections 20 and 23
- § 5. Requirements as to oleomargarine, etc., ice cream, milk, and gas

§ 1. Definition of boarding house or "house of private entertainment" license.—Any one furnishing, for compensation, lodging or diet to travelers or sojourners in any house of 30 bedrooms or less (if over 30, it is a hotel—see *Hotel*, section 1), is a keeper of a "house of private entertainment," sometimes called a "boarding house". A license is required under penalty of \$30 to \$100 for each day kept without a license. The annual license tax is \$5 if not over 10 bedrooms, and \$1 for each additional one. (Acts 1915, p. 232; 2 Code 1919, p. 3139, §§ 93 to 95.) This law does not apply to hotels (118 Va. 607).

§ 2. Definition of eating house or restaurant; license.—Any one cooking or otherwise furnishing, for compensation, diet or refreshments of any kind, for casual visitors at his house, for consumption therein, and not furnishing lodging, and not a hotel keeper (see *Hotels*, section 1) or keeper of a house of private entertainment, or boarding house, is a keeper of an eating house, sometimes called a "restaurant" or "cafe". A license is required under penalty of \$30 to \$100 for each day kept without a license. The license tax is \$25, and where the annual rent or rental value (to be determined by the commissioner of the revenue) of the house and furniture is over \$100 and not over \$1,000, an additional 5 per cent. thereon; if over \$1,000, 4 per cent; but the following persons are exempt from the license tax: persons conducting temporary eating or lodging houses, horse lots, and confectioners at camp meetings, associations, and other religious gatherings, for the sole purpose of entertaining persons, attending such religious gatherings. (1915, p. 232; 2 Code 1919, p. 3139, §§ 96 to 97½.)

§ 3. "Beating" board bills, and punishment.—See *Hotels*, section 5.

§ 4. Lien of boarding house, and enforcement of same.—See *Liens of Mechanics and Others*, sections 20 and 23.

§ 5. Requirements as to oleomargarine, etc., ice cream, milk, and gas.—Boarding houses and other places of public entertainment are required to post signs as to oleomargarine, process, or renovated butter, sold or served therein, and also warnings and directions as to use of gas. (Code, §§ 1199, 1607.)

BOARD OF SUPERVISORS

See Roads

- § 1. In general
- § 2. Their meetings
- § 3. When they audit accounts and settle with officers
- § 4. When they fix the levies
- § 5. When they recommend surveyor and superintendent of poor
- § 6. What they may do at any meeting
- § 7. Powers of a local nature
- § 8. Levy for court allowances
- § 9. County claims
- § 10. Board to provide supplies for clerks and treasurer
- § 11. Statement of receipts and expenditures to be posted and published
- § 12. How warrants signed, issued, and entered
- § 13. Compensation of supervisors
- § 14. Clerk of board, his duties and salary

§ 1. In general.—The supervisors of the districts constitute the Board of Supervisors of the county, which lay the county and district levies, pass upon all claims against the county, and perform such other duties as may be required by law. (Va. Const., § 111.) The board, thus succeeding to the administrative functions of the old county courts, is the principal organ of the county government.

§ 2. Their meetings.—They meet monthly, and may call

special meetings. Their July meeting is their annual meeting, and their January meeting there semi-annual. At the first meeting after their election, they choose a chairman, who presides, administers oaths, and countersigns all county warrants. They may require the sheriff or a deputy to be present. The Commonwealth's attorney must also attend their meetings. The Clerk of the court is clerk of the board. They sit with open doors, and the public may attend their meetings. They vote *viva voce*, or orally, yea or nay, a tie vote (when all are present) to be cast by a commissioner in chancery designated by the court for that purpose. (Code, §§ 2710-18.)

§ 3. When they audit accounts and settle with officers.—At their regular July meeting, they audit accounts of the county and settle with the officers. (Code, § 2719.)

§ 4. When they fix the levies.—At their regular January meeting or not later than their April meeting, they fix and order the county and school levies. (Code, 2720.) The Commonwealth's attorney may appeal from the order allowing the levy. (Code, §§ 2762-3.)

§ 5. When they recommend surveyor and superintendent of poor.—Ten days before the appointment of the county surveyor and the superintendent of the poor, they meet and recommend to the court suitable persons for these offices. (Code, § 2716.)

§ 6. What they may do at any meeting.—The board has power at any meeting (Code, § 2722) to—

- (1) Buy, sell, exchange, or convey the property of the county, or provide a farm for the poor (§ 2723);
- (2) Allow claims and issue warrants therefor (§ 2724);
- (3) Build and repair buildings (§ 2725);
- (4) Provide temporary offices, when necessary, insure buildings, and fix allowances to officers (§ 2626, as amended by Acts 1922);
- (5) Raise money for county expenses (§ 2727);
- (6) Protect county property, and employ assistant counsel (§ 2728);
- (7) Award premiums for scalps (§ 2729 and Acts 1918, p. 22);
- (8) Provide subsistence in time of want (§ 2730);

- (9) Appropriate money for companies of Virginia volunteers (§ 2731);
- (10) Make appropriations for advertising resources, etc. (§2732);
- (11) Offer rewards in felony cases (§ 2733);
- (12) Make appropriations for agriculture (§ 2734);
- (13) Retire outstanding bonds (Code, § 2735);
- (14) Issue bonds for 18 per cent. of value real estate (§ 2736);
- (15) Settle judgments against treasurers (Code, § 2737);
- (16) Contract loans for erection or repair of courthouse, clerk's office, jail or poorhouse (Code, §§ 2738-41);
- (17) Authorize and permit erection of Confederate monument on public square (Code, § 2742);
- (18) Sign records, when chairman is dead (§ 2744);
- (19) Perform certain duties in election for removal of courthouse (§§ 2745-55);
- (20) Make appropriation for audit of accounts of certain officers, boards, and commissioners (§ 2756);
- (21) Establish and maintain public sewers (§ 2757);
- (22) Make special laws to protect the public roads and bridges (§ 2013, and Acts 1918, p. 461);
- (23) Exempt county, district, and town or city bonds from taxation (§ 2302);
- (24) Not to tax newspapers with license tax (§ 3062);
- (25) To make special levies for pensions (§§ 2662-7);
- (26) Contract to permit laying of pipe lines in roads (§ 4060);
- (27) Perform certain duties as to public works (§ 3704);
- (28) Have trees cut along public roads (Acts 1920, p. 557);
- (29) Pay for certain public improvements (Acts 1920, p. 266);
- (30) Exercise same powers as city council in counties adjoining cities of 125,000 or more population (Acts 1920, p. 206).

§ 7. Powers of a local nature.— By section 2743 of the Code: "In addition to the powers conferred by other general

statutes, the board of supervisors of every county shall have power:

(1) To establish or abolish tolls on roads built and maintained wholly by the county and not receiving aid from the State;

(2) To adopt quarantine regulations affecting both persons and animals in furtherance of the protection of the health of the county and not inconsistent with general statutes;

(3) To adopt the necessary regulations to prevent the spread of contagious diseases among persons or animals;

(4) To provide against and prevent the pollution of water in their respective counties whereby it is rendered dangerous to the health or lives of persons residing in the county;

(5) To prevent the destruction of game, fish, wild fowls, birds, and fur-bearing animals, and to limit still further than is provided by general law the time, manner, and means by which they may be taken or killed; the number that may be taken or removed from the county in a given time, and the manner and condition of such removal;

(6) To prevent trespassing by persons, animals and fowls;

(7) To adopt such measures as they may deem expedient to secure and promote the health, safety, and general welfare of the inhabitants of their respective counties not inconsistent with the general laws of this State.

For carrying into effect these and their other powers, the boards of supervisors may make ordinances and by-laws and prescribe fines and other punishment for violation thereof, which shall be enforced by proceedings before a justice of the peace in like manner and with like right of appeal as if such violations were misdemeanors. Such fines, however, shall in no case exceed fifty dollars, and if imprisonment in the county jail be prescribed in any case, such imprisonment shall not exceed thirty days.

No such ordinance or by-law shall be passed until after notice of an intention to propose the same for passage shall have been published for two successive weeks prior to its passage in some newspaper published in the county, or if there be none such, in some newspaper published in an adjoining

county or nearby city and having a general circulation in the county of said board, and no such ordinance or by-law shall become effective until after it shall have been published in full for two successive weeks in a like newspaper."

§ 8. Levy for court allowances.— Upon a statement by the clerk of the court of allowances made by it, the board makes a levy for the payment thereof. (Code, § 2758.)

§ 9. County claims.— Claims against the county must be itemized before it will be allowed by the board. The Commonwealth's attorney must represent the county, and where he thinks proper or six freeholders request it, he must appeal to court (which operates as a supersedeas to the order for levy), and where an illegal claim has been allowed he must institute proceedings in court within 2 years, if the amount has been paid. The claimant also, if present at the disallowance, may appeal within 30 days; if not present, the clerk must serve a written notice of the disallowance, on him or his agent and he may appeal within 30 days thereafter, but in no case can an appeal be taken after 6 months after the decision, nor unless the claim exceed \$20. The appeal is taken by serving a notice on the clerk and executing a good bond to prosecute the appeal and pay costs. When an appeal is taken, the clerk immediately gives notice to the appellee, and makes up the case, with all the papers, for trial. When not appealed from, the board's action in disallowing a claim is final, unless the board agrees to an action against the county. But their refusal or neglect to act, does not improve such a bar. A judgment against the county should be provided for in the next county levy and paid by the treasurer, and no executions shall issue. An action cannot be brought, until the claim has been presented to the board for allowance. (Code, §§ 2759-65.)

§ 10. Board to provide supplies for clerks and treasurer.— The board, at the county expense, provides suitable books and stationery for their clerk, the county treasurer, and the clerk of the court, together with appropriate cases and other furniture, necessary typewriter and adding machines, and official seals. (Code, § 2767, as amended by Acts 1920, p. 242.)

§ 11. Statement of receipts and expenditures to be posted and published.— The board must cause to be made out immediately after each regular semi-annual meeting a statement of the aggregate receipts from the county levy, and the

itemized disbursements; and after the last annual meeting, also an estimate showing the aggregate amount required for next year, county officers, roads, bridges, poor, courthouse, clerk's office, jail, elections, schools, and general or incidental expenses. A copy of such statement must be posted at the front door of the courthouse and at each voting precinct, and published in a newspaper of that or an adjoining county or city. The grand jury is instructed to inquire if such statement has been so published; if not, an indictment is found against each member of the board, who are liable to a fine of \$10 to \$100. (Code, § 2768.)

§ 12. How warrants signed, issued, and entered.— They are signed by the clerk, countersigned by the acting chairman, and the name of the payee entered in a book kept for the purpose. No warrant issues, except upon a recorded vote or resolution of the board. (Code, §2772.)

§ 13. Compensation of supervisors.— Each member is paid \$6 per day and 5 cents per mile for one trip each way for traveling expenses; but they are not paid for more than 18, (not over 25 in Dickinson county), 25, 30, or 40 days per year, according as the population of the county is 10,000 or less, 30,000 or less, 40,000 or less, or over 40,00. In Henrico and Alexandria counties they may receive as much as \$300 each per year; in Chesterfield and Henry counties, \$200; in Rockingham and Shenandoah counties, \$175. They also receive pay for services under special road laws, as may be provided therein; but not for services on same day as supervisor and as inspector or commissioner of roads. (Code, § 2769, as amended by Acts 1922.)

§ 14. Clerk of board, his duties and salary.— The county clerk is an ex-officio (by virtue of his office) clerk of the board. His general duties are:

- (1) To record the proceedings of the board.
- (2) To make regular entries of all their resolutions and decisions on all questions concerning the raising of money; and within five days after an order for a levy is made, to deliver a copy thereof to each commissioner of the revenue.
- (3) To record the vote of members, if required by any member present.
- (4) To sign warrants issued, and record the reports of the treasurer of his receipts and disbursements.

(5) To preserve and file all account acted upon by the board, endorsing their action thereon, and furnish a copy of any record or account, on payment of regular fees. (Code, §§ 2770-1.)

The clerk keeps the books, records, and accounts, which are open to public inspection without charge. (Code, § 2766.)

The Board allows the clerk a reasonable compensation, not over \$150; but in Augusta and Wise counties not over \$720. (Code, § 2773, as amended by Acts 1920, p. 97.)

§ 15. Form of order by board for appointment of viewers of proposed road.— (Code, § 1977; Pollard's Code Bien-nial 1920, p. 81).

County of-----, to-wit:

At an ----- meeting of the Board of Supervisors of the County of -----, held at the Courthouse on -----, the ----- day of -----, 192--.

In the matter of the application of ----- and others to establish a public road from ----- to -----

The board doth appoint (here insert five names), resident freeholders of this county, and three of whom may act, viewers to view the route of the said proposed road, and report to the board as soon as practicable the convenience and inconveniences that will result as well to individuals as to the public, if the said road shall be established as proposed, and especially if any yard, garden or orchard, or any part thereof will, in such case, have to be taken, and whether the said road will be of such mere private convenience as to make it proper that the same shall be established and kept in order by the person or persons for whose convenience it is desired. They may examine routes other than the one proposed and report upon the one they prefer with their reasons for the preference; they will state the names of the land owners on the said route and what will be a just compensation to those requiring the same for the land to be taken, and the damage to the residue of the tracts beyond the peculiar benefits to be derived in respect to such residue from the road so proposed. And they will state any other fact or circumstance useful in enabling the board to determine the expediency of granting the said application, and they will return with their report a diagram or map showing the route thereof, and an estimate of the probable cost of establishing said road.

And the viewers shall meet on the ----- day of -----, 192--, at -----, and shall file their report with the clerk of this board on or before the ----- day of -----, 192--.

Teste:

C. C., Clerk.

BOATS

If a person unlawfully, but not feloniously (i. e., not with the purpose of stealing), take away any boat or other vessel, without permission of the owner, he forfeits to him \$10. (Code, § 2061.)

Knowingly and wilfully to fell timber or cast any waste wood into a river or creek, which shall damage or destroy a boat, is punishable by a fine of \$10 to \$100. (Code, § 4746.)

BONDS

See Forthcoming Bond; Indemnifying Bond; Promisory and Negotiable Notes

- § 1. Definition
- § 2. Nature and effect of seal
- § 3. Authority of agent to execute bond
- § 4. Kinds of bonds
 - (1) Simple bond or bill
 - (2) Penal bond or bill
 - (3) Bond with condition
- § 5. Various forms of bonds

§ 1. Definition.— A bond is a writing under the maker's seal, obligating or binding himself to pay a certain sum of money to a person named, either without or with a condition attached. The writing is also called an "obligation" or "writing obligatory", the maker the "obligor," and the person to whom the money is to be paid the "obligee." If the writing is not under seal, it is a promissory note.

§ 2. Nature and effect of seal.— A scroll affixed by way of seal is sufficient in Virginia (Code, § 5562), thus: the word "seal" or "L. S." in parenthesis, or a scroll around it, or even the word "seal" by itself, is sufficient; but the seal must be recognized in the body of the instrument, as "Witness my hand and seal" or some similar recognition. If these or similar words are omitted, the writing is not under seal

and so not a bond, but only a promissory note. The limitation on a bond, being under seal, is ten years, while a note runs only five years. (Code, § 5810.) Furthermore, no consideration need be alleged or proved, in case of a bond, as the seal implies a consideration.

§ 3. Authority of agent to execute bond.—The authority of an agent to execute a bond for his principal must be under seal or else, done in the principal's presence and by his direction. See *Agents and Agency*.

§ 4. Kinds of bonds.—There are three kinds of bonds:

(1) *Simple bond or bill*,—i. e., an ordinary bond for the payment of money on demand or at a stated time. It might be called a "promissory note under seal".

(2) *Penal bond or bill*,—which is an obligation to pay a certain sum of money, under penalty, in case he does not do so, to pay a larger amount, usually double the principal sum. Since our statute providing that a judgment for the penalty of a penal bond is to be discharged by the payment of the principal sum and interest, penal bonds are seldom used in Virginia. (Code, §§ 6261-2.)

A bond to pay a larger sum on condition underwritten to be void if the principal is paid, is in effect a penal bond.

(3) *Bond with condition*.—Besides the bond with condition to pay money, which is the same in effect, though not in form, as a penal bond, as stated in last section, we have bonds with a condition to do something else, than the payment of money or a "collateral thing", as it is called, which is a bond to pay a stated sum of money with a condition underwritten that if the stipulated thing be done, the obligation is to be void. Of this class we have indemnifying, forthcoming, refunding and suspending bonds, bonds of officers, executors, administrators, guardians, and committees, attachment, injunction, and arbitration bonds, recognizance, title bond, and other bonds with various conditions. In criminal cases, a recognizance is a bond for appearance in court, or to keep the peace or be of good behavior.

In actions on such bonds, judgment is for the penalty to be discharged by the damages sustained or amount due by reason of the breach of the condition. (Code, § 6262.)

Sometimes it is a question whether the amount stipulated in a bond or other contract is intended as a penalty or as

fixed, or (as lawyers say) "liquidated" damages. In the latter case, the entire amount is recovered. Where the damages are uncertain and not capable of being ascertained by any satisfactory and known rule, and where from the nature of the case and the tenor of the contract, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties, the amount will be held to be liquidated damages. The use of the word "penalty" or "liquidated damages" will not of itself make it so. See *Penalty*.

§ 5. Various forms of "Bonds."—

No. 1. SIMPLE BOND.

\$500.

----- months (or *years*) after date (or *on demand*, as the case may be), I bind myself to pay to C. C., five hundred dollars, with interest from date. I hereby waive the benefit of my homestead exemption as to this obligation. Given under my hand and seal, this ----- day of -----, 192---

D. D. (L. S.)

NOTE:—This bond may be converted into a "judgment bond" by the addition before the conclusion, of the following power of attorney to confess judgment:

"And I, D. D., of -----, do hereby make, constitute and appoint A. T., my true and lawful attorney in fact for me and in my name to appear, in case of default of the payment of the said sum of money whenever the same shall become due, in the clerk's office of the circuit court of ----- county, Virginia, in vacation, or before said court in term time, or before a justice of the peace of ----- county, in the magisterial district in which the said D. D. may then reside, and confess judgment in favor of C. C., against me for the sum of \$-----, and interest thereon from the ---- day of -----, 192--, and costs."

No. 2. PENAL BOND.

\$500.

----- months (or *years*) after date (or *on demand*, as the case may be), I bind myself to pay to C. C. five hundred dollars, in the penalty of one thousand dollars, with interest from date. I hereby waive the benefit of my homestead exemption as to this obligation.

Witness my hand and seal, this ----- day of -----, 192---

No. 3. TITLE BOND.

Know all men that I, J. S., am held and firmly bound unto

R. P. in the sum of twenty thousand dollars, to be paid to the said R. P., his heirs, personal representatives, or assigns; for the payment whereof I bind myself, my heirs, and assigns firmly by these presents. I hereby waive the benefit of my homestead exemption as to this obligation. Sealed with my seal, and dated this the ----- day of -----, 192---

The condition of the above obligation is such that whereas the above-bound J. S. has agreed to sell and convey to the said R. P., possession to be given immediately, a tract or parcel of land, called -----, lying in ----- county, estimated to contain ----- acres, be the same, however, ever so much more or less, and bounded as follows: [here state the boundaries]; for which the said R. P. has agreed to pay the above-bound J. S. the sum of ----- dollars, in equal annual instalments of ----- dollars each, the first to be due and payable on the ----- day of -----, 192--, and the remainder of the said instalments to be paid severally on the same day annually in each successive year thereafter for ----- years; and whereas it is agreed by and between the said parties, that after the payment to the above-bound J. S., by the said R. P., of the ----- of the said instalments, the above-bound J. S. shall and will immediately thereupon convey the premises aforesaid, with all the appurtenances thereunto belonging, by good and sure title, in fee simple, to the said R. P., his heirs and assigns, by sufficient deed of conveyance, with general (or *special*) warranty of title. Now if the above-bound J. S. shall well and truly, and according to the true intent and meaning hereof perform and satisfy each and all of the stipulations aforesaid on his part to be performed and satisfied, so that no default therein, or in any part thereof, on his part shall occur, and until the conveyance aforesaid of the said premises shall be made as aforesaid, shall permit the said R. P., his heirs and assigns, peaceably and quietly to possess, hold and enjoy the premises aforesaid, with the appurtenances thereunto belonging, without let or hindrance, then the above obligation to be void, else to remain in full force and virtue.

J. S. (SEAL)

NOTE:—For contract for sale of land, see *Contracts*.

No. 4. INDEMNIFYING BOND.
(Code, § 6154.)

Know all men by these presents, that we, P. P. (or other person) and S. S., are held and firmly bound unto X. Y., a constable (or *sheriff*) of ----- county, in the just and full sum of ----- dollars, to the payment whereof, well and truly to be made to the said X. Y., constable (or *sheriff*) as aforesaid, we bind ourselves, jointly and severally, firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ----- day of -----, 192---

Yet upon this condition, that whereas, J. T., a justice of ----- county, on a judgment obtained by P. P. against D. D., before him, the said justice, has issued a writ of *feri facias* in favor of the said P. P. against the goods and chattels of the said D. D., and whereas X. Y., a constable (or *the sheriff*) of said county, by virtue of the said writ to him directed, has levied the same on the following property, to-wit: [here describe the property; and a doubt arising whether the said property] is liable to such levy, the said constable (or *sheriff*) has required an indemnifying bond according to the statute in such case made and provided: Now, if the said P. P. shall indemnify the said X. Y., constable (or *sheriff*) aforesaid, against all damages which he may sustain in consequence of the seizure or sale of the property on which the said execution has been levied; and shall, moreover, pay to any claimant of said property all damages which he may sustain in consequence of such seizure or sale; and shall also warrant and defend to any purchaser of the said property such estate and interest therein as shall be sold under the said execution, then this obligation is to be void, otherwise to remain in full force and virtue.

P. P. [L. s.]

S. S. [L. s.]

NOTE:—In case of a *distress warrant*, insert "has issued a distress warrant" for "on a judgment * * * has issued a writ of *feri facias*," and "warrant" for "writ" or "execution." See also No. 4, under "Distress Warrant," div. IV., under *Justice of the Peace*.

In case of an *attachment*, instead of "on a judgment * * * has issued a writ of *feri facias* in favor of the said P. P. against the goods and chattels of D. D.," insert the following: "On complaint, on oath, of P. P., made in due form of law, has issued an attachment in favor of the said P. P. against the effects of the said D. D. (or *against a certain cow detained by D. D., of the value of ----- dollars, or against the estate of D. D. for ----- dollars, the value of a certain cow detained by D. D., and ----- dollars, damages for detention of same*)"; also, instead of "writ of *feri facias*" or "execution," insert "attachment."

NO. 5. INDEMNIFYING BOND IN CASE OF DETINUE.

(Code, §§ 5797-5804.)

Know all men by these presents, that we, P. P. (or other person) and S. S. are held and firmly bound unto D. D. in the just and full sum of ----- dollars (not less than double the value of the property claimed), to the payment whereof, well and truly to be made to the said D. D. (the defendant), we bind ourselves jointly and severally firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ----- day of -----, 192--

Yet upon this condition, that whereas P. P. (or A. T., *attorney or agent for P. P.*), plaintiff in the warrant in detinue of P. P. against D. D., returnable on the ----- day of -----, 192--, at -----, in ----- county, before J. T., a justice of said county, for the recovery of [here describe the property as in the warrant, stating the kind, quantity, and value], has made affidavit according to law, before J. T. (or N. P., or other proper officer), a justice of said county, whereupon and upon the due execution of this bond, the said J. T., justice aforesaid, will issue an order or other process, in due form of law, directed to the proper officer of said county, commanding him to seize and take into his possession the said property: Now, if the said P. P. (or other person) shall pay to the said D. D. all costs which may be awarded against him, the said P. P., in said warrant, and all damages which may accrue to the said D. D., or any other person, by reason of the seizure of the said property as aforesaid, then this obligation is to be void, otherwise to remain in full force and virtue.

P. P. (L. S.)

S. S. (L. S.)

No. 6. BOND TO INDEMNIFY ENDORSER OF NOTE.

Know all men by these presents, that we, A. B., principal, and R. M., surety, are held and firmly bound unto C. E. in the just and full sum of ----- dollars; to the payment whereof, well and truly to be made to the said C. E., his executors, administrators, jointly and severally, firmly by these presents. We hereby severally waive the benefit of our homestead exemptions as to this obligation. Sealed with our seals and dated this ----- day of -----, 192--.

Whereas the above-bound A. B. did, by a certain note, under his hand, dated the ----- day of -----, 192--, promise to pay unto H. K., or order, ----- months after the date thereof, the sum of ----- dollars, with interest thereon till paid; and whereas the above named C. E. hath endorsed the said note above mentioned, at the request and for the only debt of the said A. B., and thereby become chargeable with and for the payment of the said sum of ----- dollars, with interest as aforesaid, as by the said note and endorsement will at large appear: Now, the condition of this obligation is such, that if the said A. B., his executors and administrators or any of them, do and shall well and truly pay, or cause to be paid unto the said H. K. or to any person or persons whom he shall direct, the above mentioned sum of ----- dollars, for which the said note is given, and the interest that may or shall have accrued thereon on the day of payment therein mentioned and in full discharge thereof and therefrom, and from all actions, suits, charges, payments and damages by reason thereof, shall and will at all time and times hereafter, save, defend, keep harmless and indemnified, the said C. E., his heirs

executors, and administrators, and all and every of them, then this obligation to be void, else remain in full force and virtue.

A. B. (SEAL.)

R. M. (SEAL.)

NO. 7. BOND TO SAVE HARMLESS FROM PAYING RENT WHEN THE TITLE IS IN QUESTION.

Know all men by these presents, that we, C. R., principal, and R. M., surety, are held and firmly bound unto F. H. in the just and full sum of ----- dollars; to the payment whereof, well and truly to be made to the said F. H., his executors, administrators or assigns, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents. We hereby severally waive the benefit of homestead exemptions as to this obligation. Sealed with our seals and dated this ----- day of -----, 192---

Whereas there is a suit depending between the above bounden C. R. and others, touching the right and interest in the dwelling house of the above named F. H., situated [here describe its location]: and whereas the said F. H. hath nevertheless agreed to pay the rent of the said house to the said C. R., yearly, as the same shall grow due, upon his agreeing to indemnify him therefrom: The condition, therefore, of the above written obligation is, that if the said C. R., his heirs, executors and administrators, do and shall well and truly pay, or cause to be paid to the said F. H., his executors, administrators or assigns, all rent, sum or sums of money, charges and damages whatsoever, as shall by due proceedings in law be adjudged or decreed against him the said F. H., his executors, administrators or assigns, and all other costs and damages whatever, which he the said F. H., his executors, administrators or assigns, shall sustain or be at, by reason of any action, suit or forfeiture whatsoever, which shall or may happen, or be, to the said F. H., his executors, administrators or assigns, as by reason of paying the said rent, or any part thereof, to the said C. R., his executors, administrators or assigns, in manner aforesaid, then this obligation shall be void, or else remain in full force and virtue.

C. R. (SEAL.)

R. M. (SEAL.)

**NO. 8. SUSPENDING BOND, IN INTERPLEADER.
(Code, §§ 6152-3, 6155.)**

Known all men by these presents, that we, C. C., and S. S., are held and firmly bound unto X. Y., sheriff (or *constable*) of ----- county, in the sum of ----- dollars, to the payment whereof well and truly to be made to the said X. Y., we bind ourselves, jointly and severally, firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ----- day of -----, 192---

Yet upon this condition, that whereas P. P., on the ----- day of -----, 192--, caused an execution (or *warrant of distress*) to be issued by J. T., a justice of said county (or *caused an execution to be issued from the clerk's office of the circuit court of said county*), against the goods and chattels of one D. D., to satisfy the said P. P., the sum of ----- dollars, with interest thereon from the ----- day of -----, 192--, till paid, and ----- dollars cost; which writ is directed to X. Y., sheriff (or *constable* of said county), and he (or *J. R., deputy for the said sheriff*) has served the same on [here describe the property levied on]; and whereas the said C. C. claims the said goods and chattels as his property, and desires that the sale thereof shall be suspended till the claim thereto can be adjusted: Now, if the said C. C. shall pay to any person or persons who may be injured by such suspension of the sale, such damages as he or they may sustain thereby, then this obligation is to be void, otherwise to remain in full force and virtue.

C. C. [L. s.]

S. S. [L. s.]

NO. 9. BOND UPON APPLICATION FOR WARRANT TO SEIZE PROPERTY, IN
DETINUE.

(Code, §§ 5797-5804.)

Know all men by these presents, that we, P. P. (or other person) and S. S. are held and firmly bound unto D. D. in the just and full sum of ----- dollars (not less than double the value of the property claimed), to the payment whereof, well and truly to be made to the said D. D. (the defendant), we bind ourselves jointly and severally firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ----- day of -----, 192--.

Yet upon this condition, that whereas P. P. or (A. T., *attorney or agent for P. P.*), plaintiff in the warrant in detinue of P. P. against D. D., returnable on the ----- day of -----, 192--, at -----, in ----- county, before J. T., a justice of said county, for the recovery of [here describe the property as in the warrant, stating the kind, quantity, and value], has made affidavit according to law, before J. T. (or N. P., or other proper officer), a justice of said county, whereupon and upon the due execution of this bond, the said J. T., justice aforesaid, will issue an order or other process, in due form of law, directed to the proper officer of said county, commanding him to seize and take into his possession the said property: Now, if the said P. P. (or other person) shall pay to the said D. D. all costs which may be awarded against him, the said P. P., in said warrant, and all damages which may accrue to the said D. D., or any other person, by reason of the seizure of the said property as aforesaid,

then this obligation is to be void, otherwise to remain in full force and virtue.

P. P. (L. s.)

S. S. (L. s.)

No. 10. BOND FOR RETURN OF PROPERTY TO DEFENDANT IN DETINUE.

(*Idem.*)

Know all men by these presents, that we, D. D. and S. S., are held and firmly bound unto P. P. (the plaintiff) in the just and full sum of ----- dollars (not less than double the value of the property claimed), to the payment whereof, well and truly to be made to the said P. P., we bind ourselves, jointly and severally, firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ----- day of -----, 192--.

Yet upon this condition, that whereas, in the warrant in detinue, of P. P. against D. D., returnable at -----, in ----- county, before J. T., a justice of said county, for the recovery of [here describe the property as in the warrant in detinue, stating the kind, quantity, and value], the said P. P. had, in due course of law, caused the said property to be seized and taken from the possession of the said D. D., and the said D. D. now desires to have the said property returned to his possession, to be held by him until final judgment is rendered in the said warrant in detinue: Now, if the said D. D. shall have the said property forthcoming, at -----, in said county, on the ----- day of -----, 192--, to answer final judgment in the said warrant in detinue, respecting the same, and shall, furthermore, pay to the said P. P. all costs and damages which may be awarded against him, the said D. D., in said warrant, and damages which may accrue to any person by reason of the return of the said property to him, the said D. D., then this obligation is to be void, otherwise to remain in full force and virtue.

D. D. [L. s.]

S. S. [L. s.]

No. 11. ATTACHMENT BOND.

[See "Attachments," div. II., under title *Justice of the Peace*, No. 5].

No. 12. FORTHCOMING OR REPLEVY BOND, IN ATTACHMENT.

(Code, §§ 6394-5, 6414-15.)

Know all men by these presents, that we, D. D. (or other person) and S. S., are held and firmly bound unto P. P. in the just and full sum of dollars, to the payment whereof well and truly to be made to the said D. D., we bind ourselves, jointly and severally, firmly by these presents: and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ----- day of -----, 192--.

Yet, upon this condition, that whereas J. T., a justice of ----- county, did, on the ----- day of -----, 192--, on the complaint on oath of P. P. made in due form of law, issue an attachment in favor of the said P. P., against the estate of the said D. D., for ----- dollars (or *against a certain cow detained by the said D. D., or, if the said cow cannot be found, then against the estate of the said D. D., for ----- dollars, the value of the said cow, and ----- dollars damages for detention of same*); which attachment is returnable at -----, in said county, on the ----- day of -----, 192--, before the said J. T., or such other justice as may then be there to try the said attachment (or *to the next ----- term of the circuit court of said county*); and whereas the said attachment has come to the hands of X. Y., constable (or *sheriff or deputy for the sheriff*) of said county to be served, who, by virtue thereof, levied on and seized, in possession of the said D. D., the following property, to-wit: [here describe the property]; and the said D. D., now desiring to retain in (or *have returned to*) his possession the said property (or *to release from the attachment the whole of the estate so attached, if it be a replevy bond*), has tendered the said S. S. as his surety in this bond: Now if the said D. D. shall have the said property, attached as aforesaid, forthcoming at such time and place as the said justice (or *court*) may require (or *shall perform the judgment of the justice or court, if it be a replevy bond*), then this obligation is to be void, otherwise to remain in full force and virtue.

D. D. (L. s.)

S. S. (L. s.)

No. 13. FORTHCOMING BOND, IN CASE OF EXECUTION OR DISTRESS.
(Code, §§ 6578, 6520.)

Know all men by these presents, that we, D. D. and S. S., are held and firmly bound unto P. P. in the just and full sum of ----- dollars, to the payment whereof, well and truly to be made to the said P. P., we bind ourselves, jointly and severally, firmly by these presents; and we hereby severally waive the benefit of our homestead exemptions as to this obligation. Witness our hands and seals, this ----- day of -----, 192---

Yet upon this condition, that whereas J. T., a justice of ----- county, * on a judgment obtained by P. P. against D. D., before him, the said justice, has issued a writ of *ieri facias** in favor of the said P. P., against the goods and chattels of the said D. D., which writ, with the legal costs attending the same, is for a sum amounting to ----- dollars; and whereas X. Y., a constable (or *the sheriff*) of said county, by virtue of the said writ to him directed, has levied the same on the following property, to-wit [here describe the property]; and the said D. D. desires to keep the said property in his possession and at his risk, until the day of the sale thereof, and has tendered the said S. S. as surety for the forthcoming and delivery thereof at the day and place of sale, according to the statute in such

case made and provided: Now, if the said D. D. and S. S., or either of them, do and shall deliver the aforesaid property to the said X. Y., constable (or *sheriff*) aforesaid, at the courthouse (or other place), in the said county, on the ----- day of -----, 192--, then and there to be sold, to satisfy the said execution in favor of the said P. P., then this obligation is to be void, otherwise to remain in full force and virtue.

D. D. (L. S.)

S. S. (L. S.)

In case of a *distress warrant*, insert "has issued a distress warrant," instead of the words between the stars, and "warrant" for "writ" or "execution."

No. 14. REFUNDING BOND TO EXECUTOR ON HIS PAYING A LEGACY.

Know all men by these presents, that we, B. C. and R. M., are held and firmly bound unto C. D., executor of the last will and testament of H. K., deceased, in the just and full sum of \$-----, to the payment whereof, well and truly to be made to the said C. D., executor as aforesaid, his executors, administrators or assigns, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. We hereby waive the benefit of our homestead exemptions as to this obligation. Sealed with our seals and dated this ----- day of -----, 192--.

Whereas, H. K., late of -----, deceased, did, by his last will and testament, bearing date the ----- day of -----, 192--, give and bequeath unto B. C., the sum of ----- dollars, as by reference being had to the said will, recorded in the clerk's office of ----- court, Will Book, Vol. -----, page -----, will more fully appear; and the said B. C. now desires the legacy to be paid to him, and C. D., the executor of said will, having agreed to pay the same to him, and has paid the same to said C. D., contemporaneously with his the said B. C.'s executing this refunding bond, as required by law, and the said B. C. executes this his refunding bond, with the said E. M., his surety: Now, therefore, if the said B. C. shall refund a due proportion of any debts or demands which may hereafter appear against the decedent H. K., and of the costs attending their recovery, then the obligation shall be void, otherwise to remain in full force and virtue.

B. C. (SEAL.)

R. M. (SEAL.)

No. 15. BOND THAT INFANT SHALL CONVEY, UPON ATTAINING HIS MAJORITY.

Know all men by these presents, that we, R. S., principal, and D. M., surety, are held and firmly bound unto J. B., in the just and full sum of ----- dollars; to the payment whereof, well and truly

to be made to the said J. B., his executors, administrators or assigns, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. We hereby severally waive the benefit of our homestead exemptions as to this obligation. Sealed with our seals and dated this ----- day of -----, 192---

Whereas, T. S., late of -----, deceased, by his last will and testament in writing, bearing date on or about the ----- day of -----, 192--, did, among other things, give, devise and bequeath all that messuage or tenement situate in -----, unto his sons, R. S. and H. S.; which will more fully appear by reference being had to the said will, recorded in the clerk's office of the county of -----, Will Book, Vol. -----, page ----- And whereas, the above named J. B. hath agreed with the said R. S. and H. S., for the absolute purchase of the said messuage or tenement and premises so devised to them as aforesaid, at and for the sum of ----- dollars; but the said H. S., not being yet of age, cannot join in conveying the same to the said J. B. And whereas the said J. B. hath, at the request of the above-bound R. S. and on his promise and undertaking that the said H. S., should, when and so soon as he should have attained the age of twenty-one years, at the costs and charges of the said J. B., convey and assure to the said J. B., his heirs and assigns, all his right, title and interest in and to the said messuage or tenement and premises that being an undivided moiety, paid into the hands of R. S. the whole of the purchase money, and the said R. S. hath, by his deed, conveyed his undivided moiety thereof to the said J. B., his heirs and assigns. Now, the condition of this obligation is such, that if he, the said H. S., do and shall when and so soon as he shall have attained the age of twenty-one years, at the costs and charge of the said J. B., convey and assure unto the said J. B. his heirs and assigns, by such deeds and conveyances as the counsel of the said J. B. shall approve of, his undivided moiety of and in the said messuage or tenement and premises, devised to him and the said R. S. as aforesaid, and that without any consideration to be paid him by the said J. B. for so doing; and also, if, and in case the said R. S., his heirs, executors or administrators, do and shall, in the meantime, and until the said H. S. shall have executed such conveyance as aforesaid, save, defend, keep harmless and indemnified, the said J. B., his heirs, executors and administrators, and his and their goods and chattels, lands and tenements, and the said messuage or tenement and premises, to be conveyed by the said H. S. to the said J. B. as aforesaid, and the rents, issues and profits thereof, of and from all claims and demands to be made thereto, by or on the part and behalf of the said H. S., then this obligation to be void and of none effect, else to remain in full force and virtue.

R. S. (seal.)

D. M. (SEAL.)

No. 16. BOND WHERE SUPERSEDEAS IS AWARDED.

(Code, § 6338.)

Know all men by these presents, that we, A. B. and E. F., are held and firmly bound unto C. D. in the just and full sum of ----- dollars, which well and truly to be paid we bind ourselves, our heirs, jointly and severally firmly by these presents, &c., we hereby severally waive the benefit of the homestead exemptions as to this obligation. Sealed with our seals and dated this ----- day of -----, 192---

The condition of the above obligation is such that whereas the said A. B. hath obtained from one of the judges of the Supreme Court of Appeals of Virginia (or from the Supreme Court, &c.), a writ of supersedeas as to a judgment rendered against him in the ----- court of ----- for the sum of ----- dollars, with interest thereon from the ----- day of -----, 192--, and ----- dollars with interest thereon from the ----- day -----, 192--, and ----- dollars costs: Now, if the said A. B. shall perform and satisfy the said judgment, proceedings on which are so stayed by the said writ of supersedeas, in case the said judgment be affirmed or the said supersedeas be dismissed, and shall, also, in the same case pay all damages, costs and fees which may be awarded against or incurred by the said A. B. in the appellate court, and also all actual damages incurred in consequence of the said supersedeas; then the above obligation to be void, otherwise to remain in full force and virtue.

A. B. (L. s.)

E. F. (L. s.)

No. 17. INJUNCTION BOND.

(Code, § 6324.)

[Follow the preceding form to the condition:]

The condition of the above obligation is such that, whereas the above-bound A. B. hath obtained from the judge of the circuit court for ----- county, an injunction to stay, until the further order of the said court, all further proceedings on a judgment of the circuit court for the county of -----, recovered against him by the above-named C. C., on the ----- day of -----, 192--, for ----- dollars, with interest thereon, to be computed after the rate of six per centum per annum, from the ----- day of -----, 192--, till payment, and the costs. Now, if the said A. B. shall well and truly pay and satisfy the judgment aforesaid, and all such costs and damages as shall be awarded against him in case the injunction aforesaid shall be dissolved, then the above obligation to be void, otherwise to remain in full force and virtue.

A. B. (SEAL.)

E. F. (SEAL.)

Or, if the court or judge awarding the injunction shall so direct, the last clause of the condition may be thus:

"Now, if the said A. B. shall well and truly pay the value of the property levied on under execution of *fiert factas* on the judgment aforesaid, by X. X., sheriff of the county of -----, or shall have the said property forthcoming to abide the future order of the court, and to pay all such costs and damages as shall be awarded against him, the said A. B., in case the injunction aforesaid shall be dissolved, the above obligation," &c.

Or, if a forthcoming bond has been given under the judgment, then with a further condition in each of the above cases, to "indemnify and save harmless the sureties in the forthcoming bond executed by the said A. B., and their representatives, against all loss or damage in consequence of the said suretyship."

BOUNDARIES

See *Adjoining Land-owners; Adverse Possession; Drainage; Fences*

- § 1. Location of boundary
- § 2. Lines along water courses
- § 3. Lines along highways, etc
- § 4. Boundaries ascertained upon petition
- § 5. Injury to or destruction of land-mark a misdemeanor

§ 1. Location of boundary.—In questions of boundary, natural objects or landmarks, marked trees or lines, and reputed boundaries well established, are preferred to mere courses and distances and magnetic lines. The order of preference is (1) natural landmarks, (2) artificial monuments, (3) adjacent boundaries, and (4) courses and distances. Unless controlled by other calls or known monuments, calls for courses and distances must be strictly followed. Oral testimony is admissible to locate corners and lines, and to prove the calls for course and distance are mistaken; even the declaration of a deceased person as to the identity of a particular corner-tree or boundary, is admissible, if such person had peculiar means of knowing the fact in question, by being a surveyor, chain carrier, or other person present at the survey, the original or adjoining owner, tenants, and others, whose duty or interest would likely impress the fact on their mind.

Even reputation or family tradition is admissible to prove a boundary, whether public or private. (See *Conveyances*.)

§ 2. Lines along water courses.— Where lands are described as bounded by, on, or running along a non-navigable stream, the line or boundary is the center of the stream, though the objects called for are on the bank or shore. The end of the line is found by drawing a line at right angles to the shore from the object to the center of the stream. But if the land is bounded "on the shore of the stream," then the bank or shore at low water-mark is the boundary. The boundary of public or navigable streams is the bank or shore at low water-mark, however zig-zag it may be. Low water-mark is where the stream is at its lowest ordinary stage. A navigable stream is one capable of bearing a vessel with 20-ton or more burden and communicates with other states or countries. (See *Conveyances* and *Water and Watercourses*.)

§ 3. Lines along highways, etc.— Where land is described as "bounding on", "running along," etc., a highway, street, or alley, or even a private way, the line runs to the middle thereof; subject, of course, to the use of the same as such; but otherwise if it is described as bounded by "the side" thereof. Where a park or other public ground is referred to as a boundary, the outside line of the park is the boundary. (See *Conveyances*.)

§ 4. Boundaries ascertained upon petition.— By a recent statute, any person having an interest in real estate, upon petition filed in court, or at rules in the clerk's office may have his boundary line ascertained and designated by a jury, or by the court, if both parties consent. (Code, § 5490.)

§ 5. Injury to or destruction of land-mark a misdemeanor.— Unlawfully to break down, destroy, deface, injure or remove any monument erected to designate the boundaries of any city, town, tract, or lot of land, or any tree marked for that purpose, is punishable by a fine of \$5 to \$500. (Code, § 4479.) Removing a line fence, under another clause of the statute, may be punished as a trespass—see *Trespass*.

BOYCOTT

See Conspiracy

A boycott is a combination to harm a person by coercing others to harm him. In other words, it is an agreement or conspiracy, generally secret, of two or more persons, for the purpose of injuring another by preventing his customers from doing business with him, through fear of incurring the displeasure, persecution, and vengeance of the conspirators. Such an agreement is unlawful and punishable as a conspiracy. If injury results, damages may be recovered. A boycott may be stopped by an injunction.

Combinations in the nature of boycotts, which have been held to be unlawful conspiracies, are: To compel a member of a labor union to pay a fine for working in a mill with steam machinery, by preventing his obtaining employment; to obstruct an employer in the conduct of his business; to coerce an employer to conduct his business with reference to apprentices and delinquent members according to the demand of the union, by injuring his business through notices to customers and material men that dealing with him would be followed by similar measures against them; to prevent the employment of a granite cutter declared by a labor union to be a "scab"; to discharge non-union men; to induce employees to leave their employment and prevent others from entering it; to induce workmen to quit in a body to enforce the demands of a labor union; to parade in front of a factory with banners to induce workmen to keep away; to gather around a place of business and follow employees to and from work, and to collect about their boarding places with threats, intimidations, and ridicule; to combine as a labor union to withdraw their patronage from a given concern.

But workmen may lawfully combine to obtain higher wages. The combination is lawful so long as the purpose is to obtain a benefit for themselves; but if the means employed to accomplish this object is an interference with the rights of others, by misrepresentation, intimidation, molestation, or coercion, then the act becomes unlawful. (See general common law authorities.)

BRANDS

See Trade Marks.

- § 1. Saw-logs, timber, and lumber
- § 2. Tobacco—see *Tobacco*
- § 3. Flour, meal, bread, and salt
- § 4. Brands or marks by inspectors—see *Inspectors*
- § 5. False brand or mark
- § 6. Liability of manufacturer or packer
- § 7. Fertilizers
- § 8. Misbranded food
- § 9. Vinegar and cider
- § 10. Oleomargarine
- § 11. Sheep
- § 12. Bottles, siphons, tins, kegs, crates, boxes, etc.

§ 1. **Saw-logs, timber, and lumber.**—Saw-logs rafted or floated in Louis river are required to be branded, and the brand recorded. (Code, §§ 3579-81.) A person may also brand saw-logs, piles, hewn or square timber, which he desires to raft or float in Elizabeth river or any of its tributaries, or in the Albemarle and Chesapeake canal or Dismal Swamp canal, or in any river or creek connecting with either of said canals, or in the Chesapeake bay. Upon recording such brand, he is protected in its use. (Code, §§ 144-7.) A person desiring to float logs or timber in any river of the State may adopt a brand or trade-mark, which is to be recorded. The act gives the form of such writing. Such brand on logs or timber is a proof of the ownership thereof. Unbranded logs or timber taken up, to be reported to the clerk. (Code, §§ 1448-54.)

§ 2. **Tobacco.**—See *Tobacco*.

§ 3. **Flour, meal, bread and salt.**—These must be marked by the manufacturer with his brand, along with the weight. (Code, §§ 1416-17.)

Adulterated flour must be branded "Combination," with the name and percentage of each ingredient used. (Code, § 1194.)

Unlawful to sell meal as Virginia or Old Dominion meal, when it is not. (Code, § 1195.)

§ 4. **Brands or marks by inspectors.**—See *Agriculture*.

§ 5. **False brand or mark.**—It is unlawful to use a false brand or mark, or to sell goods so marked. (Code, §§ 1438-9.)

§ 6. Liability of manufacturer or packer.— If a penalty be recovered from a seller or other person than the manufacturer or packer, such person may recover the amount from the manufacturer or packer. (Code, § 1440.)

§ 7. Fertilizers.— See *Adulterations; Agriculture.*

§ 8. Misbranded food.— See *Pure Food and Drug Laws.*

§ 9. Vinegar and cider.— The manufacturer of cider vinegar must brand it "cider vinegar". (Code, § 1191.)

The seller of pure apple cider must brand it "pure apple cider"; any other cider must be branded "chemical cider". (Code, § 1192.) See *Adulterations.*

§ 10. Oleomargarine.— This must be marked "Oleomargarine" in Roman letters not less than a half an inch square. (Code, §§ 1202-3.) See *Adulterations.*

§ 11. Sheep.— It is a \$5 fine to drive sheep along a road over ten miles, without branding them. (Code, § 4742.)

§ 12. Bottles, siphons, tins, kegs, crates, boxes, etc.— See Acts 1920, p. 441.

BREACH OF PROMISE TO MARRY

§ 1. The promise to marry

§ 2. The breach

§ 3. The defenses

(1) No valid promise to marry

(2) A discharge from the promise

§ 1. The promise to marry.— There must be an offer of marriage accepted. A mere intention communicated to a third person out of her presence, is not sufficient. The offer or acceptance may, however, be through a friend or agent; it need not be in express words; it is sufficient if both parties so understood it. A conditional agreement to marry is good, if the condition is legal, as, after a parent's death and the like. But a promise conditioned on getting a divorce, or death of present spouse, or sexual intercourse with intended bride, or the like is not binding, being contrary to public policy. If the time and place are not fixed, the law

fixes it within a reasonable time at the bride's residence. If the marriage is fixed to be longer than one year, the promise must be in writing, under the statute (Code, § 5561). A minor, or one whose marriage would be void or voidable, as, in the case of white person and negro, a person already married, a person forbidden to marry by reason of kinship (Code, §§ 5084-5), an insane person, or one incapable from physical causes from entering into the marriage state, cannot make a valid promise to marry. But in such cases (except in case of a minor or insane person), the party may be liable for deceit. Force, fraudulent concealment, and false representations may invalidate contracts to marry: thus, where the promise is made at the point of a pistol or to get free from actual confinement; or the woman conceals the fact that she is not chaste or not fit for sexual intercourse, or is already engaged to another person; or where she falsely represents her social position, fortune, or character, whereby he is deceived. (See 1 Min. Inst. 276; 3 Min. Inst. 326-9.)

§ 2. The breach.—There is a breach of contract to marry, (1) where the party refuses to marry on the day fixed; (2) where no day is fixed, and the party upon request, after a reasonable time, refuses to set the day; (3) where the party marries some other person; or (4) where he repudiates his promise and declares that he will not marry her, in which case, suit may be brought at once, even though a future day was set for the marriage. (See 3 Min. Inst. 327.)

§ 3. The defenses.—The defenses to an action for breach of promise are:

(1) *No valid promise to marry*, for any of the reasons set forth under section 1, above, as, being on an illegal condition, being a minor, or one whose marriage would be void or avoidable, or in cases of force, fraudulent concealment, or false representation of a material fact; or

(2) *A discharge from the promise*.—Even where there was a valid promise, the party is discharged or released from keeping it for any of the following reasons: (a) The unchaste character, or lewd conduct of the female toward other men, unknown to him at the time of their engagement; (b) the subsequent release from the promise for valuable consideration, and ceasing for a long time to correspond or visit,

not otherwise accounted for, tends to prove such release; (c) where the plaintiff has broken her contract or failed to carry out some condition herself, or has become insane or physically incompetent to engage in sexual intercourse, or been guilty of fornication with some one else. (1 Min. Inst., 276-8.)

§ 4. **Damages.**—The damages for a breach of promise to marry are largely in the discretion of the jury, whose verdict the court is reluctant to set aside for being excessive, especially where an unsuccessful attempt has been made to impeach the plaintiff's character. She may recover not only for her pecuniary loss and the disappointment of her reasonable expectations of material and worldly advantages resulting from the intended marriage, but also for wounded feelings and mortification and pain and for the harm done her prospects in life. And to discourage wrongs of this kind, the jury may give additional damages by way of punishment and as an example to others, called "punitive" or "exemplary" damages. The jury may consider the defendant's general reputation for wealth, his social position, the length of the engagement, the depth of her devotion, her lack of independent means; her mortification and injured feelings and affections, loss of reputation and social standing, and expenses in preparation for the marriage. (1 Min. Inst 278.)

BRIBERY

See Lobbying

- § 1. Bribes to officers or candidates for office
- § 2. Acceptance thereof by officer
- § 3. Evidence in prosecutions under the two preceding sections
- § 4. Bribe to officers to prevent service of process
- § 5. Giving bribes to, or receiving same by, commissioners, auditors, jurors, etc.
- § 6. Attempting by bribe to influence voter
- § 7. Giving or receiving bribe for vote
- § 8. Bribing agents, employees, or servants; witnesses exempt from prosecution
- § 9. Bribery disqualifies to vote or hold office or to serve as a juror
- § 10. Form of "description" in warrant or indictment

§ 1. Bribes to officers or candidates for office.—If any person corruptly give, offer, or promise to any executive, legislative, or judicial officer, or to any candidate for such office, and either before or after he shall have qualified, or shall have taken his seat, any gift, or gratuity, with intent to influence his act, vote, opinion, decision, or judgment on any matter, question, cause, or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years. This section shall also apply to a resident of this State, who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise, and thereafter return to this State.” (Code, § 4496.) Bribery of an election officer is punishable by a fine not over \$500 or jail not over 12 months, or both. (Code, §§ 195, 4782.)

§ 2. Acceptances thereof by officer.—“If any executive, legislative, judicial officer, sheriff, constable or police officer, or any candidate for such office accept in this State, or if, being resident in this State, such officer or candidate shall go out of this State and accept, and afterwards return to and reside in this State, any gift or gratuity, or any promise to make a gift or do any act beneficial to such officer or candidate under an agreement, or with an understanding that his vote, opinion, or judgment shall be given on any particular side of any question, cause, or proceeding which is or may be by law brought before him in his official capacity, or that in such capacity he shall make any particular nomination or appointment or take or fail to take any particular action, or perform any duty required by law, he shall, upon conviction, be confined in the penitentiary not less than one nor more than ten years, and shall forfeit his office and be forever incapable of holding any post mentioned in section 289, (i. e., “any office of honor, profit, or trust under the Constitution of Virginia”). The word candidate as used in this and the preceding section shall mean any one who offers himself or is put forward by others as a suitable person or an aspirant for such office.” (Code, § 4497, as amended by Acts 1920, p. 486.)

§ 3. Evidence in prosecutions under the two preceding sections.—“No person prosecuted under either of the two

preceding sections shall be competent to testify against a witness for the Commonwealth in such prosecution touching the giving, or offering to give, or the acceptance of any bribe by such witness prior to the commencement of such prosecution, nor shall any witness called by the court or Commonwealth's attorney and giving evidence for the prosecution, either before the grand jury or the court in such prosecution, be ever proceeded against for any offense of giving, or offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify, and for refusing to answer questions may, by the court, be fined a sum not exceeding \$500, and be imprisoned for a term not exceeding six months." (Code, § 4498.)

§ 4. Bribes to officers to prevent service of process.—"If any officer, authorized to serve legal process, receive any money or other thing of value, for omitting or delaying to perform any duty pertaining to his office, he shall be confined in jail not exceeding six months, and be fined not exceeding \$100." (Code, § 4502.)

§ 5. Giving bribes to, or receiving same by, commissioners, auditors, jurors, etc.—"If any person give, or offer, or promise to give, any money or other thing of value, to a commissioner appointed by a court, auditor, arbitrator, umpire, or juror, (although not impaneled), with intent to bias his opinion or influence his decision in relation to any matter in which he is acting or is to act, or if any such commissioner, auditor, arbitrator, umpire, or juror, corruptly take or receive such money or other things, he shall be confined in jail six months, and fined not exceeding \$500." (Code, § 4503.)

§ 6. Attempting by bribe to influence voter.—Punishment, fine not over \$1,000, and jail not over one year. (Code, § 4725.)

§ 7. Giving or receiving bribe for vote.—Punishment, fine \$100 to \$1,000 or jail one to 12 months. (Code, § 4727.)

§ 8. Bribing agents, employees, or servants, witnesses exempt from prosecution.—It is a misdemeanor, (1) to give, offer, or promise to an agent, employee, or servant, any gift whatever, without the knowledge and consent of his principal, employer or master, with intent to influence his action in relation to his principal's, employer's, or master's business:

or (2) for such agent, employee, or servant, without such knowledge and consent, to request or accept a gift or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner as to said business; or (3) for an agent, employee, or servant, being authorized to procure material, supplies, or other articles either by purchase or contract for his principal, employer, or master, or to employ service or labor for him, to receive directly or indirectly for himself or another, a commission, discount, or bonus from the person who renders such service or labor; or to give or offer to give such commission, discount, or bonus, is punishable by a fine of not over \$500, or jail not over 12 months, or both. Witnesses for the prosecution are themselves exempt from prosecution, but they may be compelled to testify and for refusal may be punished for contempt. (Code, §§ 4712-13, 4782.)

§ 9. Bribery disqualifies to vote or hold office or to serve as juror.—See Va. Const., §§ 23, 32; Code, §§ 82, 5984.

§ 10. Form of "description" in warrant or indictment.—

No. 1. BRIBING AN OFFICER.

(Code, § 4496.)

DESCRIPTION:

"did unlawfully and corruptly give (or *offer or promise to give*) to G. H., a duly elected (or *appointed*) ----- [here state what officer or candidate], five dollars (or other gift or gratuity), with intent to influence his opinion, decision, and judgment (or *act and vote*) on a [here state on what matter, question, cause, or proceeding]."

No. 2. WARRANT OF ARREST FOR AN OFFICER ACCEPTING A BRIBE.

(Code, § 4497, as amended by Acts 1920, p. 486.)

DESCRIPTION:

"being then a duly elected (or *appointed*) ----- [here state what officer or candidate], did unlawfully and corruptly accept [here state what the gift, gratuity, or promise was] from one T. R., under an agreement and with an understanding with him that the said C. D.'s opinion and judgment (or *vote*) should be [here state how the vote, opinion, or judgment was to be, and in reference to what question, cause, or proceeding], then pending (or *which might have been brought*) before him in his official capacity."

No. 3. RECEIVING A BRIBE FOR OMITTING OR DELAYING TO SERVE PROCESS.
(Code, § 4502.)

DESCRIPTION:

"being an officer authorized to serve legal process, to-wit: the sheriff (or *constable*) of said county, did unlawfully and corruptly receive ----- dollars (or other thing) from one T. R. for omitting and delaying to [here state what official duty was omitted or delayed]."

No. 4. BRIBING A VOTER.
(Code, § 4726.)

DESCRIPTION:

"did unlawfully and corruptly give to G. H., a legal voter in the [here state what election], ----- dollars (or other thing), under an agreement with him that he, the said G. H., should vote for O. R., a candidate in said election for the office of -----."

No. 5. VOTER RECEIVING A BRIBE.
(*Idem.*)

DESCRIPTION:

being then a legal voter in the election held on the ----- day of -----, 192--, did unlawfully and corruptly receive from G. H. ----- dollars, under an agreement with him that he, the said C. D., would vote for O. R., a candidate in said election for the office of -----."

BRIDGES

- § 1. Establishment, etc., of public bridges
- § 2. Duty of owner or occupier of dam to maintain bridge
- § 3. Foot bridges, etc
- § 4. Supervisors may contract for building or repairing bridges
- § 5. How bridges between two counties opened and built
- § 6. What use of bridges forbidden
- § 7. Toll bridges
- § 8. Burning bridge
- § 9. Obstructing or injuring bridge
- § 10. How travelers to pass on bridge
- § 11. How bicycle to pass vehicle or horse
- § 12. Fast riding, driving or racing over bridge
- § 13. Injuries resulting from defective bridge

§ 1. Establishment, etc of public bridges.— These are established, construed, improved, and repaired like public roads. See *Roads, Bridges, Landings, and Wharves*. On turnpikes, bridges must be made where necessary. (Code, § 4075.)

§ 2. Duty of owner or occupier of dam to maintain bridge.— Every owner or occupier of a dam must, so far as a road passes over it, keep such dam in good order, at least twelve feet wide at the top, and also keep in good order a bridge of like width over the pier-heads, flood-gates, or any wash-out through or around the dam; and must erect and keep in good order a strong railing on both sides of such bridge or dam, unless such railing be dispensed with by the board of supervisors. For failure herein, he will be fined \$2 for every 24 hours, not to exceed \$50; and where a mill-dam is carried away or destroyed, he will not be subject to such fine until one month after the mill has been put into operation. The fine is recoverable before a justice and goes to the county road fund. (Code, § 1985.)

§ 3. Foot bridges, etc., to be constructed.— The superintendent of roads must cause to be placed and kept over every stream where it is necessary and practicable a sufficient bridge, bench, or log for the accommodation of foot passengers. (Code, § 1989.)

§ 4. Supervisors may contract for building or repairing bridges.— When a bridge or causeway is necessary, and it is not practicable for the superintendent of roads to have it built or repaired, the board of supervisors may contract therefor, and to this end may appoint one or more commissioners to receive proposals. (Code, § 1990.)

§ 5. How bridges between two counties opened and built.— The board of supervisors of one county may notify the board of another, that a bridge and causeway, or either, is necessary over a place betweeen the two counties, and if such board concurs in this opinion, it appoints three commissioners to meet there on a certain day and agree with commissioners of the other board as to the manner and conditions of doing the work. Upon this order being communicated to the other board, it makes a similar appointment; and the result of such joint conference is reported to their respective boards. Then each board directs the same or other

commissioners (not over three) to unite in receiving proposals for doing the work as agreed upon by them or by the boards. If the boards cannot agree, an appeal may be taken to court. If either board fails to act or to unite in doing the work, it may be compelled by mandamus. (Code, §§ 1991-2, as amended by Acts 1918, p. 431.)

§ 6. What use of bridges forbidden.—No person must use any county bridge as a wharf from which to unload any vessel or boat, nor as a place of deposit for any property, nor for any other purpose except for a crossing. Nor must the master or owner of any vessel fasten the same to or lay the same along side such bridge. The penalty is a fine of \$5 to \$20 to the county road fund. (Code, § 1994.)

§ 7. Toll bridges.—For the law as to toll-bridges, see Code, §§ 2067-72.

§ 8. Burning or blowing up a bridge.—Maliciously burning or destroying by explosives a bridge is punishable by penitentiary from 1 to 10 years. (Code, § 4433.)

§ 9. Obstructing or injuring bridge.—Maliciously to obstruct, remove or injure any bridge or fixture thereof, is punishable by penitentiary from 2 to 10 years, and in case of death resulting therefrom, it is murder; if the act is not malicious, but unlawful, the punishment is penitentiary 1 to 3 years or jail not over 12 months and fine of \$100 to \$500. (Code, § 4468.)

“Knowingly and wilfully, without lawful authority,” to break down, destroy, or injure any bridge, bench, or log placed across a stream for the accommodation of pedestrians, or persons on foot, is punishable by a fine of \$1 to \$100. (Code, § 4730.)

If a bridge be damaged or destroyed by knowingly and wilfully felling timber or casting waste wood into any river or creek, the punishment is a fine of \$10 to \$100. (Code, § 4746.)

§ 10. How travelers to pass on bridge.—See *Roads, Bridges*, etc., section 8, (8).

§ 11. How bicycle to pass vehicle or horse.—See *Roads, Bridges*, etc., section 8, (6).

§ 12. Fast riding, driving or racing over bridge.—See *Roads, Bridges*, etc., section 8, (9).

§ 13. Injuries resulting from defective bridge.—By the common law, towns and cities are liable for injuries result-

ing from their negligent failure to keep their bridges in proper repair, but counties are not so liable as to county bridges. One who for his own convenience constructs a bridge on a public road, is liable for an injury resulting from his negligent failure to keep it in proper repair. (See general common law authorities.)

BROKERS

See *Agents and Agency; Licenses and License Taxes*, section 30, as to "Pawnbrokers"

- § 1. Definition
- § 2. Kinds of brokers
 - (1) Real estate broker
 - (2) Insurance brokers
 - (3) Merchandise brokers
 - (4) Stock brokers
- § 3. Authority of brokers
- § 4. Broker must use good faith
- § 5. Liability in negotiating note, etc., without endorsement
- § 6. Compensation
- § 7. License
 - (1) Merchandise broker
 - (2) Stock broker
 - (3) Bankers or brokers dealing in options or futures
 - (4) Ship brokers
 - (5) Insurance broker

§ 1. Definition.— A broker is one whose business is to bring parties together to contract, or in their name to contract for them in some line of business. (See section 7, below.) Unlike a factor or commission merchant (see *Commission merchant*, he does not usually have possession of the goods. His authority is not so broad, and his contracts are generally made in the name of his principal. His general duties and liabilities are the same as in the case of agents in general—see *Agents and Agency*.

§ 2. Kinds of brokers.— A broker usually chooses some one line of trade, and he is described in reference to that

trade, as real estate broker, merchandise broker, stock broker, ship broker, insurance broker, etc.

(1) *Real Estate broker*.—See *Real Estate Agent or Broker*.

(2) *Insurance Broker*.—An insurance broker is one who makes it his business to secure insurance, for those who employ him, from various companies. He differs from an insurance *agent* who works for and represents a certain, or perhaps several, insurance companies, while the broker is the agent of the insured rather than of the insurer. He does not have as broad authority as a general insurance agent, who may bind the company. A policy is secured by him from the company, rather than executed by him for the company. Consequently there is not usually any act which he can do in signing policies, waiving or inserting provisions therein which can bind the company, although a general insurance agent would have such powers.

(3) *Merchandise Broker*.—A merchandise broker is one who represents buyers and sellers of merchandise without having possession of it. He usually deals in some one line and is described and known in reference to that line, as for instance, as cotton broker, a sugar broker, a tea and coffee broker, a grain broker. He does not have the authority of a factor from whom he essentially differs in not having the possession of the goods.

(4) *Stock Broker*.—A stock broker buys and sells stocks of corporations for customers. He often differs from the other kinds of brokers and comes to have more the character of a factor. He often has possession of the stock, and buys and sells in his own name. A common practice is for him to sell stock on margin. In that case the buyer becomes the owner of the stock, which is bought by money loaned by him to the customer and the customer's own money in proportions usually of about 90 per cent. and 10 per cent. The amount put up by the customer is said to be put up on margin. (see section 7, (2), below.)

§ 3. *Authority of broker*.—The broker usually acts in each instance upon a special authority and has very little implied authority to bind his principal. A broker does not usually have possession of the subject matter of the contract as in the case of a factor. His authority is specially con-

ferred and therefore limited. For instance, if one deals with a real estate broker he cannot usually assume that the broker's authority is extensive. He must look to the actual authority that has been expressly conferred. Thus C cannot assume that A, a real estate broker, has any authority to sell B's land. He may take A's word for it, but he is not really protected except upon B's word to that effect, which he should have in writing. Many times indeed a broker has no actual authority but simply brings parties together, whereupon they arrive at their own terms.

Where a broker has actual authority, it is usually to be construed in the light of customs and usages which are of universal use in that locality and trade. If one goes by means of his broker into a market or exchange he usually must be taken to have instructed the broker to proceed in respect to the well known customs and rules that prevail there, and he will be bound by these. This is perhaps more true of stock brokers than of other kinds, because it is their business which is so largely governed by customs, usages and rules.

A broker usually has no authority to receive payment (a real estate broker may) or to extend credit, as the factor may. In any particular case, however, this authority might appear either expressly or from the circumstances.

§ 4. Broker must use good faith.— A broker must not secretly represent both parties, nor secretly buy from or sell to himself or in any way oppose his own interests to those of his principal. What we have said in general of the agent's duty (see *Agents and Agency*), applies here as elsewhere. Perhaps the temptation to violate that duty is found more often in the case of the broker than of other agents. Certain it is that many of the cases found in the reports of the secret receiving of double commissions, or the secret representing of other parties, are cases of brokers. Where a broker violates his duties in this respect he loses his right to commissions and the transaction is voidable if the third party is also in collusion.

§ 5. Liability in negotiating note, etc., without endorsement.— Where a broker or other agent negotiates a note or other negotiable instrument without endorsement, unless he discloses the name of his principal and the fact that he is acting only as agent, he will himself be taken to warrant the

instrument to be genuine and what it purports to be, that he has a good title to it, that all prior parties had capacity to contract, and that he knows no fact which would impair the validity of the instrument or render it valueless. But the warrant extends in favor of only the first party to whom the delivery is made. (Code, § 5631.)

§ 6. Compensation.—A broker is usually employed on commission. He earns his fee when he performs his engagement. He is usually employed upon a contingent fee. Whether he has earned his fee or not depends on the terms of his employment. He may be employed to sell upon certain terms, or he may not have authority to propose any terms, but simply undertakes to find a buyer or purchaser. (4 Bay's Gen. Com. Law, §§ 81-85.)

§ 7. License.—(1) *Merchandise brokers.*—Such a broker, under the license laws, is any person, firm, or corporation who receives or distributes provisions and merchandise, including flour, hay, or grain, shipped to him or it for distribution on account of the shipper, or who participates in the profits from the sales, or who invoices such sales or collects the money therefor. He is required, under penalty of fine of \$50 to \$1,000, to obtain a license. The license tax is \$50, if commissions are not over \$1,000; but if over \$1,000, an additional tax of \$1.00 on each \$100, or fraction thereof, in excess of \$1,000. (Acts 1915, p. 232; 2 Code, 1919, p. 3124, §§ 48, 49.)

(2) *Stock (including loan) broker.*—A stock (including a loan) broker is any person, firm, bank, or corporation that deals in coin, foreign or domestic, exchange, government stock, or other certificates of debt, or shares in any corporation or chartered company, bank notes or other notes used in currency, or who sells the same or any of them on commission, or for other compensation, or who negotiates loans upon real estate security, except a licensed attorney. A stock broker may buy and sell for profit or sell on commission, either privately or by auction. He is required, under a penalty of a fine of \$100 to \$5,000, to obtain a license; but a licensed attorney may do the business of a broker without further license. The license tax is \$100 in towns not over 5,000; if in a city from 5,000 to 10,000, \$150; if over 10,000, \$250, for

each office or place of business. (Acts 1915, p. 232, 2 Code 1919, p. 3132, §§ 75, 76.)

(3) *Bankers or brokers dealing in options or futures.*—Any person, firm or corporation engaged in buying and selling, or who receives orders to buy or sell, cotton, grain, provisions, or other commodities, stocks, or bonds, is a banker or broker dealing in options. A license is required, under a penalty of \$300 to \$500. The license tax is \$200. (Acts 1915, p. 232; 2 Code 1919, p. 3132, §75.)

(4) *Shipbrokers.*—A ship-broker is one engaged in the management of business matters occurring between the owners of vessels and the shippers or consignors of the freight which they carry. A license is required, under penalty of \$100 to \$500. The license tax is \$50. (Acts 1915, p. 232; 2 Code, 1919, p. 3132.)

(5) *Insurance Broker.*—He is one who solicits for compensation, directly or indirectly to be derived therefrom, any fire, marine, life, or other insurance, either for the insured or the insurance company, except the duly authorized agent (or clerk actually employed in his office) of any insurance company licensed to do business in this State, is an insurance broker. This does not apply to duly authorized agents exchanging business among themselves. To act as an insurance broker without a license is punishable by a fine of \$50 to \$500. The license tax is \$100, which is paid to the Commissioner of Insurance, in Richmond, and by him paid into the treasury. Any person or firm who shall fill up, sign, and deliver a policy or certificate for a corporation or association or persons not licensed to do an insurance business by a legally authorized agent, shall be considered an agent of such corporation, etc., and such corporation, etc., shall be liable for all licenses, taxes, and penalties as if represented by a legally appointed agent. And an insurance broker cannot place insurance in any such corporation, etc. (Acts 1915, p. 232; 2 Code 1919, p. 3136, §§ 83, 84.)

BUDGET SYSTEM

For act establishing the budget system for the State,
see Acts 1920, p. 118.

BUGGERY

- § 1. Definition and punishment
- § 2. Form of "description" in warrant or indictment

§ 1. Definition and punishment.—Buggery, which includes "bestiality" and "sodomy," is the carnal copulation, or sexual intercourse, against the order of nature, of man with man, or, in the same unnatural manner, of man with woman, or by man or woman in any manner with a brute beast. The punishment is penitentiary 2 to 5 years. (Code, § 4451.)

§ 2. Form of "description" in warrant or indictment.—

No. 1. BUGGERY WITH A BRUTE ANIMAL.

(Code, § 4557.)

DESCRIPTION:

"feloniously did commit the detestable and abominable crime against nature by having carnal copulation and intercourse with a brute animal, to-wit: with a mare (or other brute animal)."

BUILDING AND LOAN AND INDUSTRIAL LOAN ASSOCIATIONS

See Corporation; Credit Unions

- § 1. Object and scheme of building and loan association
- § 2. Organization of a building and loan association; costs
- § 3. General powers
- § 4. Loans and premiums
- § 5. Dues, interest, and fines

- § 6. Payment of loans; withdrawal and default of stockholders
- § 7. By-laws
- § 8. Foreign associations
- § 9. Substituting trustees
- § 10. Supervision by State Corporation Commission
- § 11. Taxation of building and loan associations
- § 12. General provisions applicable to such associations
- § 13. Industrial loan associations

§ 1. Object and scheme of building and loan associations.—The purpose of a building and loan association, as stated in the statute, is to “encourage industry, frugality, and home building and saving among its members.” This is accomplished by several persons uniting, and by means of monthly payments accumulating a fund, which is loaned out to home builders and others, and repaid by them in monthly instalments. Not only is one thereby stimulated to save small amounts each month, but the accumulated fund is loaned out as fast as it accumulates, and his money may be loaned out each month as fast as he pays it in. If there be no premium or bonus, i. e., extra amount charged him for getting the loan, or if the premium is not too much and the association is fairly and intelligently conducted, this is a splendid way for a poor man, who can depend on a steady income, to save up for “a rainy day,” or to purchase a home by paying each month an amount about equal to monthly rent. Such associations accommodate a class of borrowers that oftentimes cannot borrow elsewhere, and make more home-owners than perhaps any other institution.

The capital of a building and loan association is the shares of stock, which are generally \$100 each. One person buying a share pays for it at the rate usually of 50 cents a month. It would thus take at 50 cents a month 200 months, or 16 $\frac{2}{3}$ years, to pay for a share; but the money paid each month is loaned out at interest, and the shareholder getting credit for the interest, the time is much shortened, and with the profits by way of membership fee, premium or bonus, fines, withdrawals, and forfeitures, the time of maturity of stock is usually seven or eight years. That is, a person paying 50 cents a month for that time, gets back at the end of that time \$100. A person who takes shares of stock for the purpose of borrowing, may borrow \$100 on each share, by giving

good security, which is usually a first lien on real estate. The borrower sometimes has to pay about 20 cents a share as premium or bonus, in order to get the loan, which with the payment on his shares, and interest, constitute his monthly payment. If he has 10 shares and borrows \$1,000, his monthly payment would be as follows:

Payment on 10 shares	\$10.00
One month's interest on \$1,000	5.00
Premium on loan of \$1,000 (10 shares)	2.00
<hr/>	
Total	\$17.00

Instead of payments on loans until the stock is matured, the modern association usually provide that the borrower shall pay a certain specified number of payments, the loan being for such time as may be agreed upon. In other words, under the Virginia act, the association loans money like any other person, as to amount of monthly payments, time, terms, etc., except it may charge what it pleases by way of premium (the amount being fixed by its by-laws). See section 4 and 5 below. Loan associations in these latter days are in the business largely, if not entirely, for the purpose of loaning money, and that at a higher rate of interest than the law allows to others, they usually charging 6 per cent. for the entire time, and no premium is charged; but considering all the advantages, they are a great thing for the industrious and saving poor man, who can do no better.

§ 2. Organization of a building and loan association; costs.—A building and loan association may be incorporated by five or more persons executing, filing, and recording a certificate, as in the case of other corporations generally (Code, § 4154, as amended by Acts 1920, p. 318)—see *Corporation*, section 4; for costs, see section 5. Their affairs are controlled by a president and board of directors; but the most active officials are the secretary and treasurer.

§ 3. General Powers.—A building and loan association may lend to the stockholders or to other persons the money accumulated from time to time, purchase land or erect houses, and sell, convey, lease, or mortgage the same at their pleasure to or for the benefit of their stockholders. It may acquire, hold, convey, and incumber all or any property, real or personal, taken by it as security or otherwise acquired by

it in the due course of business; and may also secure the payment of loans and the performance of the conditions upon which loans are made and the payment of the purchase money for any property sold by taking personal security, or by a mortgage or deed of trust upon real or personal property and by a transfer and pledge of its stock. Such association may maintain branch offices at different places. (Code, § 4154, as amended by Acts 1920, p. 318.)

§ 4. Loans and premiums.—The association may fix by its by-laws the premiums or bonus at which it will dispose of the money in its treasury to the stockholders, and award or lend to any member or stockholder the value of any shares held by him less such premium or bonus; and the mode of making the disposal, loan, or award shall be fixed by the by-laws, and it may charge and receive said premium in advance, or in instalments; or in default of application for said money by stockholders it may lend the same to other persons on such terms as may be agreed upon and in such manner as may be fixed by the by-laws; but where it lends its funds taking as security any order or assignment of wages, tangible personal property, or any security except real estate or the shares of stock upon which has been paid a sum equal to the amount of the loan, the laws of the State and ordinances of cities and towns as to the conduct of money loaning and rates therefor, apply to it as to other persons or corporations. (Code, § 4154, as amended by Acts 1920, p. 318.)

At least two-thirds of the loans must be on real estate, or the license will be revoked. (Code, § 4166.)

A person desiring a loan usually makes, on a blank furnished, written application, to the board of directors, who refer the application to appraisers and the treasurer then reports the allowance and directs the solicitor to examine the title of the property and prepare the deed of trust, etc.

§ 5. Dues, interest, and fines.—The association may levy, assess, and collect from its stockholders dues or payments upon every share of its stock, the amount, time, and manner of payment of the same to be fixed by the by-laws, and the said stock may be paid off and retired as the by-laws direct; and may levy, assess, and collect from borrowers interest upon the par (or face) value of the shares redeemed (or purchased back); and may levy, assess, and collect fines

for the non-payment of dues or for failure to comply with or perform any other obligation or duty to the association. The amount of the fines are to be fixed by the by-laws, and they are imposed under regulations to be made by the by-laws. (Code, § 4155.)

It may loan money to persons not members or shareholders at not over 6 per cent., and aggregate the principal and interests and divide the amount into equal monthly or other instalments, evidenced by promissory notes or bonds and secure the same by deed of trust on real estate. (Code, § 4154, as amended by Acts 1920, p. 318.)

§ 6. Payment of loans; withdrawal and default of stockholders.—A borrower may repay the loan at any time, but if he repays before maturity of the loan, he pays such an amount for the privilege as may have been agreed upon or is provided for in the by-laws; and if the premium has been deducted in advance, he is refunded such proportion of the premium bid as the by-laws may determine. Stockholders withdrawing voluntarily receive such proportion of the profits of the association or such rate of interest as may be prescribed by the by-laws. (Code, § 4156.)

§ 7. By-laws.—The association adopts by-laws for its government and the management of its business not inconsistent with the act. (Code, § 4157.)

§ 8. Foreign associations.—A foreign association, to do business here, must comply with the laws as to such corporations doing business in Virginia. (Code, §§ 4158-62.)

§ 9. Substituting trustees.—The association itself may, as provided in its by-laws, appoint a trustee, whenever necessary to do so. (Code, § 4167.)

§ 10. Supervision by State Corporation Commission.—These associations are placed under the full supervision of the commission, with authority to the commission to revoke their license where they are not bona fide building and loan associations, although operating under such name. (Code, §§ 4163-6, and acts 1922, amending § 4163.)

§ 11. Taxation of building and loan associations.—They are exempt from State franchise tax. (Code, § 4168.) For other taxation, see *Licenses, and License Taxes, and Taxation and Tax Bill.*

§ 12. General provisions applicable to such associations.

—The general laws as to corporations in General Code, §§ 3776-3848, and Acts 1920, pp. 489, 494, 565, amending §§ 3780, 3846, 3847, respectively), apply to building and loan associations.

§ 13. Industrial loan associations.—By an act of 1920 to encourage thrift and savings among industrial classes similar to the encouragement offered by building and loan associations, the incorporation of industrial loan associations are authorized for the purpose of making small loans to industrial classes on security and at a low rate of interest. They are organized like building and loan associations or corporations in general—see *Corporations*, section 4; and section 5, for costs of obtaining a charter. The general laws applicable thereto are the same as those cited in section 12, above. The minimum capital is \$30,000, which must be fully paid in before commencing business. There are to be at least 10 directors, who must be citizens and each own in his own right at least \$100 of the par value of the capital stock. Ceasing to own that much stock vacates his office. Such association may loan money to be repaid in periodical instalments, secured by the obligation of the borrower, or by other security, but not for longer than 4 years, nor a greater amount than 10 per cent. of its paid in capital stock and surplus. The loans may be made to persons, firms, or corporations. The interest is the legal rate, payable in advance, upon the entire loan. The loans are to be repaid weekly or monthly, and in case of 30 days' default, the entire amount may be declared due and payable. They may adopt by-laws; and may fix by them such fines as it will charge for non-payment of instalments, not more than 10 per cent. of the loan for the default in the payment of \$1.00 or fraction thereof; but no such charge shall be cumulative. The State Corporation Commission has supervision of such associations, domestic or foreign, and may require of them statements of their financial condition when desired; for a failure to make such statements upon request, general or special, for 30 days thereafter, they are fined by the commission \$100 to \$1,000, unless, in answer to a rule, good cause be shown against it. Such associations chartered hereunder, are taxed like building and loan associations (see section 11, above. (Acts 1920, p. 61.)

BURGLARY

See *House-breaking, etc.*

- § 1. Definition of burglary and punishment
- § 2. Constituents of offense:
 - (1) The breaking
 - (2) The entering
 - (3) The intent
 - (4) The time
 - (5) The house
- § 3. Possession of burglars' tools, with intent to commit burglary, robbery, or larceny
- § 4. Possession of stolen goods not prima facie proof of burglary
- § 5. Form of "description" in warrant or indictment

§ 1. **Definition of burglary and punishment.**—Burglary in Virginia is the breaking and entering the dwelling-house of another with intent to commit some felony or larceny therein. The punishment is death, or penitentiary 5 to 18 years. (Code, § 4437.)

§ 2. **Constituents of offense.**—(1) *The breaking.*—This may be by physical force, or by threats, fraud (as, where he enters under a pretense of business or the like), or conspiracy (as, where a servant admits him by agreement or the like). The breaking may be by merely opening a shutter or door or other like means.

(2) *The entering.*—Even of a hand, foot, or head, or of a stick, hook, gun, or other thing.

(3) *The intent.*—This must be to commit a felony (i. e., capital or penitentiary offense), or a larceny (i. e., stealing) in the house.

(4) *The time.*—It must be in the night-time. By "night" is meant when there is not enough day-light to discern a person's countenance. It may, of course, be by moon-light or star-light.

(5) *The house.*—A dwelling-house (which includes an outhouse which is a parcel thereof and in which some one usually lodges at night). (Code, § 4429.) H.'s G. & M., pp. 167-70.)

§ 3. **Possession of burglars' tools, with intent to commit burglary, robbery, or larceny.**—This is punishable by

penitentiary from 5 to 10 years. Possession of such tools is prima facie evidence of the criminal intent. (Code, § 4437.)

§. Possession of stolen goods not prima facie proof of burglary.—But along with other guilty conduct it is sufficient to convict. (H.'s G. & M., p. 170.)

§ 5. Form of "description" in warrant or indictment.—

No. 1. BURGLARY, WHERE THE INTENT IS TO COMMIT FELONY OR LARCENY.
(Code, § 4437.)

DESCRIPTION:

"about the hour of ----- o'clock, in the night-time of that day, feloniously and burglariously did break and enter the dwelling-house of the said A. B., situated in said county, with intent then and there feloniously to commit a felony and larceny."

The above form will suffice even though the felony be *actually committed*; but in that event, it were better, if the crime be a capital one, to proceed for such felony itself rather than for the burglary.

No. 2. BURGLARY AND LARCENY

(*Idem.*)

DESCRIPTION:

"about the hour of ----- o'clock, in the night-time of that day, feloniously and burglariously did break and enter the dwelling-house of the said A. B., situated in said county, with intent the goods and chattels in the said dwelling-house then being feloniously and burglariously to steal, take, and carry away, and one silver watch of the value of ----- dollars, of the goods and chattels of the said A. B., in the said dwelling-house then being, feloniously and burglariously did steal, take, and carry away."

This is the form most commonly called into use, and if *burglary* should fail, *larceny* may be sustained; but the burglary may be sustained even though the larceny be not committed.

BURYING-GROUNDS

See Dedication; Easements

- § 1. Conveyance to trustees for cemetery; their powers; condemnation; location; quantity of land, etc.
- § 2. Gifts or grants for cemeteries
- § 3. Removal of remains by owner of grounds for purpose of sale
- § 4. Selling unused burying-grounds
- § 5. Injuries to
- § 6. Robbing a grave
- § 7. Keeper has powers of constable

§ 1. Conveyance to trustees for cemetery; their powers; condemnation; location; quantity of land, etc.—See Code, §§ 50-53, 56-57.

§ 2. Conveyance or will for cemeteries.—Conveyance or will in perpetuity (for long periods) are valid. (Code, § 59, as amended by Acts 1920, p. 9.)

§ 3. Removal of remains by owner of grounds for purpose of sale.—This may be done by suit in court. (Code, § 58, as amended by Acts 1918, p. 485.)

§ 4. Selling unused burying-grounds.—An act provides for the condemnation by cities and towns of abandoned or unused and neglected burying-grounds, and disposition of the remains. (Code, §§ 54, 55.)

§ 5. Injuries to.—Wilfully and maliciously to destroy, mutilate, deface, injure or remove or carry away any tomb, monument, grave-stone, fence, railing, or other structure, or any tree, shrub, plant, flowers, wreaths, vases, or other ornaments, in a burying-ground; or wilfully to obstruct proper ingress and egress to or from a cemetery or lot of a memorial association, is punishable by a fine not over \$100, or jail not over six months. (Code, § 4553.) See, also, *Trespass*.

§ 6. Robbing a grave.—Unlawfully to disinter or displace a dead human body, or any part thereof, from a burial place is punishable by penitentiary from 5 to 10 years. (Code, § 4552.)

§ 7. Keeper has powers of constable.—The superintendent or other person in charge of a public or private cemetery, has the powers of a constable in criminal and police matters, within and for one-quarter of a mile beyond the same. (Code, § 2820.)

BY-LAWS AND CONSTITUTION.

See Corporations

- § 1. Definition
- § 2. Power to make and alter by-laws
- § 3. Validity of by-laws
- § 4. Binding on whom
- § 5. Form of constitution and by-laws for a literary society

§ 1. Definition.—A by-law is a law made by a corporation by authority of its charter or some general statute, or a law made by some club or society not incorporated, with the consent of the members, for the government of such corporation, club, or society. Rules and regulations established for the government and guidance of the public or third persons, as, rules as to passengers, and the like, are not by-laws, but regulations.

§ 2. Power to make and alter by-laws.—This power is in the stockholders, but the power may be conferred upon the directors by the charter or a resolution of the stockholders. By-laws thus made by the directors, may be altered by the stockholders. (Code, § 1105e (8).) In the case of non-stock corporations, the like power is in the members having voting power, but the power may be conferred upon the trustees, directors, or managers, by the charter or a resolution of such members. By-laws thus made by the trustees, directors, or managers may be altered or repealed by such members. (Code, § 3787.) Unless otherwise provided, a majority vote controls.

In the case of clubs or societies not incorporated, by-laws are usually prepared by a committee appointed to draught them, and then adopted by a majority vote of the club or society.

§ 3. Validity of by-laws.—By-laws of a corporation must be reasonable and within the scope of its object, affect all equally, and be not contrary to law or its charter. In the case of unincorporated clubs or societies, the court has nothing to do with the reasonableness of a by-law.

§ 4. Binding on whom.—Persons not members, and third persons not consenting to a by-law, are not bound by it. Third persons dealing with corporations are not (though

members are) considered as having notice of its by-laws, and even if they have notice, they are not bound by the by-laws, unless it be construed to be a regulation for the public or to be a part of a contract. Reasonable regulations of corporations for the government of the public are binding on third persons.

§ 5. Form of constitution and by-laws for a literary Society.—

CONSTITUTION

PREAMBLE

For our mutual improvement in literature and debate and the cultivation of fellowship and good feeling among us, we, the undersigned, do form ourselves into an association to be known by the name and title of -----.

ARTICLE I

OFFICERS

The officers of this society shall consist of a President, Vice President, Secretary, Censor, Treasurer, and an Executive Committee of two.

ARTICLE II

DUTIES OF OFFICERS

Section 1. *President*.—It shall be the duty of the President to preside at all meetings of the society, to expound and enforce a due observance of the Constitution and By-Laws; impose fines and decide all questions of order; call all special meetings; appoint all committees not otherwise provided for; sign all treasury orders; fill all temporary vacancies and perform such other duties as his office may require. He shall make no motion or amendment, nor vote at any time except at elections, or unless the society be equally divided, when he shall give the casting vote.

Sec. 2. *Vice President*.—In the absence of the President, the Vice President shall perform the duties of that officer.

Sec. 3. *Secretary*.—It shall be the duty of the Secretary to keep in a book provided for the purpose, full and complete minutes of all proceedings of the society; also, a record of the name and residence of each member, giving the date of his admission, resignation or expulsion. He shall at the opening of each meeting call the roll, note all absences, and read the minutes of the previous meeting. He shall countersign all treasury orders; and at the end of each month report to the Treasurer all fines. He shall also carry on all correspondence of the society.

Sec. 4. *Censor*.—It shall be the duty of the Censor to keep a record of the regular exercises which have taken place in the society, with their dates, together with a roll of the members and duties as-

signed him; to appoint two (2) judges of debate; to assign to the members the regular business chosen by the society; at each regular meeting to read an essay on the proceedings and deportment of the preceding meeting, which shall be neatly copied in a book for that purpose.

Sec. 5. *Treasurer*.—It shall be the duty of the Treasurer to receive all moneys belonging to the society; to keep in a book provided for the purpose an account of all financial transactions and at the expiration of his term of office to present a full account of the receipts and expenditures during his continuance in office, and hand over to his successor all books and moneys belonging to the society.

Sec. 6. *Executive Committee*.—It shall be the duty of the Executive Committee to prepare all programs and assign parts to members; to hand to the president a program (subject to revision by the society on motion), of the exercises of the next meeting, and to perform all business relating to the society.

Sec. 7. *General*.—All officers of this society shall perform the several duties which are delegated, or which may hereafter be delegated to them, respectively, by the Constitution and By-Laws of the society, or any amendment to the same.

ARTICLE III

ELECTIONS

Section 1. All elections shall be by ballot.

Sec. 2. Two negative votes shall debar a candidate from admission to this society.

ARTICLE IV

MEMBERSHIP

Section 1. All members of this society shall be ----- (*Limit the membership to a given locality or otherwise if desired.*)

Sec. 2. The maximum number of members of the society shall be -----.

ARTICLE V

AMENDMENTS

This constitution shall remain unaltered, except by a vote of two-thirds of all the members and after two weeks' notice.

BY-LAWS

ARTICLE I

MEETINGS

Section 1. This society shall hold its meetings on every Tuesday evening, commencing at half-past seven.

Sec. 2. Eight members shall be necessary to constitute a quorum.

Sec. 3. At the request of three members, the President shall call a special meeting of the society.

Sec. 4. The meetings of the society shall be open to the public, but the society may at any time decide, by a majority vote, to sit with closed doors for any number of meetings or during any portion of any meeting.

ARTICLE II.

ELECTION AND INDUCTION OF OFFICERS.

Section 1. The elections for officers of the society shall be held on the first regular meetings of March and September.

Sec. 2. Each officer shall be inducted at the meeting succeeding his election, and shall continue in office until his successor shall have been duly elected and installed.

Sec. 3. At the induction of each officer the President shall propound the following obligation, which must be answered in the affirmative: "Will you, to the best of your ability, without fear or favor, faithfully discharge the duties of your office, and pledge yourself to sustain the Constitution and By-Laws of this society?"

ARTICLE III.

VACANCIES.

In case of vacancies occurring in any office, the society shall immediately proceed to an election to fill the same.

ARTICLE IV.

MEMBERSHIP.

Every candidate for admission shall read and sign the constitution before becoming a member.

ARTICLE V.

JUDGES OF DEBATE.

The President together with two judges of debate, who shall be appointed by him each evening, shall decide each completed debate and report their decision through the President, at the meeting at which the debate shall be delivered.

ARTICLE VI.

CENSURE OR REMOVAL.

Any officer, who neglects his duty, shall, upon motion of a member, be liable to censure or removal, by a two-thirds vote of the members present.

ARTICLE VII.

FINES.

Section 1. The President shall have power to impose a fine not exceeding one dollar on any member of the society for misconduct or neglect of duty; provided that any member may move, at the meeting at which any such fine is imposed, to remit said fine, and in case such motion is voted for by two-thirds of the members present when the fine is imposed, said fine shall be remitted, and provided further,

that the President shall have power in his discretion, at any time to remit any fine which may have been imposed on any member of the society.

Sec. 2. If the fines imposed on any member of the society and remaining unpaid, shall at any time amount to one dollar, such member shall be notified of the fact by the Treasurer, through the Secretary, and if such fines shall not be paid or remitted by the President within three weeks after notice, the name of such member shall, by order of the President, be stricken from the list of members, and he shall cease to be a member of the society.

ARTICLE VIII.

EXEMPTION FROM PERFORMANCE.

All officers of this society, except President, shall take part in the regular exercises.

ARTICLE IX.

LIMIT OF DEBATE.

No member shall speak more than five minutes on any motion or resolution before the society. The leaders in debate shall each be permitted to speak fifteen minutes; all others being allowed ten minutes.

ARTICLE X.

ALTERATIONS.

No alteration or introduction of any By-Law shall be made without a two-thirds vote of the society and two weeks notice in writing. In case of emergency, a By-Law may be suspended by a like vote of the members present, but only for one meeting.

ARTICLE XI.

CUSHING'S MANUAL.

In the decision of all points of order Cushing's Manual shall be the authority.

ARTICLE XII.

ORDER OF BUSINESS.

1. Calling to Order.
2. Calling of Roll.
3. Reading of Minutes.
4. Elections.
5. Reports of Committees.
6. Current Business.
7. Program.
8. Adjournment.

No. 2. BY-LAWS OF A SOCIAL CLUB.

ARTICLE I.

The name of this organization shall be -----

ARTICLE II**MEMBERSHIP**

Residents of ----- shall be eligible to membership, when elected as herein provided.

ARTICLE III**OFFICERS**

The officers shall consist of a President, six Vice Presidents, Recording Secretary, Corresponding Secretary, Treasurer, and a Governing Committee of eleven members, all of whom shall be elected by separate ballot, at the annual meeting.

ARTICLE IV**DUTIES OF OFFICERS**

The President shall preside at all meetings. In his absence, one of the Vice Presidents shall preside.

The Recording Secretary shall keep accurate minutes of all meetings, and shall mail to each member all notices required by the By-Laws of the Club, or ordered at any meeting. Mailing notices to the last known post office address of each member shall be sufficient.

The Corresponding Secretary shall attend to the correspondence of the Club under the direction of the Governing Committee.

The Treasurer shall receive and have custody of all the funds of the Club; pay all bills approved by a majority of the Governing Committee, as hereinafter provided; and all expenditures ordered by the Club. He shall keep accurate accounts of all financial transactions; a separate account with each member; shall be at the Club room on the first Saturday evening of each month to receive dues in arrears.

Two weeks before the annual meeting he shall also render a complete account to the Auditing Committee, to be composed of the President, First Vice President and Secretary, which account, together with the report of the Auditing Committee, shall be presented at the annual meeting.

The Treasurer shall also submit a full account whenever called upon by the Club or Governing Committee to do so.

The Governing Committee, subject only to the authority of the Club, and of this Constitution, shall be custodians of the Club property; shall exercise general supervision of the Club and its rooms, and shall endeavor to promote and secure the comfort and enjoyment of its members. They shall provide for all the usual and ordinary necessities of the Club, such as light, heat, attendance, cards, repairs of property, and shall have power to make rules governing games. All bills for such usual and ordinary expense shall be paid by the Governing Committee; but no unusual or extraordinary expenditure shall be incurred except with the sanction of the Club first obtained. The Governing Committee shall receive and consider all complaints made to them in writing, signed by any member of the Club, and shall remedy them, when well founded, if possible. They shall

keep minutes of their meetings, and shall report to the Club at the annual meeting, and at any other time when required by the Club, all complaints and their action thereon. They may call special meetings of the Club at any time, and shall call a special meeting whenever demanded by five members in writing, specifying the purpose, to which the business of the meeting shall be confined.

ARTICLE V

MEETINGS

There shall be one regular meeting of the Club in each year, which shall be held on the first Tuesday evening of January, at eight o'clock, of which, and all special meetings, three days' notice shall be given to each member by mail. In case of special meetings, the notice shall specify the purpose to which the business shall be confined. The annual meeting and all other business meetings shall be held in the Club rooms, but all public meetings under the auspices of the Club, must be held in some public hall.

The anniversary of this Club shall be celebrated annually on the first Thursday of -----, either with a banquet in the Club rooms, or with some suitable demonstration, in a public hall, whichever in the wisdom of the Governing Committee shall be deemed best.

ARTICLE VI

DUES

Each member shall be required to pay to the Treasurer ----- dollars per year, in monthly installments, on the first Monday of each month. Failure to pay dues for three months after notice, shall effect the suspension, and failure to pay dues for one year after notice, shall effect the expulsion of the delinquent member; who shall not be restored to membership until all arrears are paid, nor until his restoration be approved by the Governing Committee.

ARTICLE VII

APPLICATION FOR MEMBERSHIP

Applicants for membership must be proposed in writing by two members of the Club, to the Governing Committee, who shall immediately cause five days' notice to be given by the Secretary to each member, of the name of the applicant and of his proponents and the date at which it is intended to post him for election. If any objection to the applicant shall be made known to the Governing Committee, they shall consider it (always maintaining entire secrecy as to the objector), and if in their judgment the objection is sufficient, the name of the applicant shall not be posted. If otherwise, or if there be no objection, the applicant's name, with the names of the proponents, shall be posted in a conspicuous place in the Club room for one week, beginning on the day named in the notice. The election shall be by ballot, which shall be deposited by each member in person (not in any case by proxy), the name of the member voting being

deposited with his ballot, and three black balls shall be sufficient to reject. At the expiration of one week the ballot box shall be opened by not less than three members of the Governing Committee and the result publicly announced. The votes of a majority of the members in good standing shall be necessary to elect.

ARTICLE VIII.

MEMBERSHIP FEE.

New members must pay to the Treasurer ----- dollars before acquiring any rights of membership. If not paid within thirty days after notice of election, all rights under the election shall be forfeited.

ARTICLE IX.

PRIVILEGES.

No person resident in the City of ----- will be admitted to the privileges of the Club save by permission of a member of the Governing Committee. Non-residents of the city may be introduced by members. Any member introducing a friend will be held responsible for his good behavior.

ARTICLE X.

CLUB PROPERTY.

No books, papers, or property of any sort shall be removed from the Club rooms on any pretext.

ARTICLE XI.

CONDUCT OF MEMBERS.

Violation of any of the rules of the Club, disorderly conduct, or any form or expression of discourtesy to any member or guest, will be cause for reprimand, and if persisted in, will be cause for expulsion. But no member shall be expelled except after full hearing of the charges against him by the Governing Committee, and then only by a majority present at a meeting called to act on the case.

ARTICLE XII.

QUORUM.

Twelve members in good standing shall constitute a quorum at Club meetings for the transaction of all business, save the adoption of amendments to the Constitution and By-Laws.

ARTICLE XIII.

GAMBLING—LIQUORS.

Games of any sort for money or any other stake, and gambling of any kind, are prohibited in the Club rooms. Card playing, billiard playing, pool-playing, or any other games, will not be permitted on the Sabbath day. No intoxicating liquors shall be allowed in the rooms of the Club.

ARTICLE XIV.

SINKING FUND.

If at any time, after the expenses of the organization and equipment of the Club have been paid, the funds in the treasury shall exceed the sum of two hundred and fifty dollars (\$250), such excess, when amounting to one hundred dollars (\$100) and upwards, shall be invested by the Governing Committee, in the name of the Club, in safe interest bearing securities, the same to be and remain a permanent fund, until such time as the Club shall, by a two-thirds vote, authorize its use for the purchase of a building for the use and purposes of the Club, or make other legal and proper disposition of the said fund.

ARTICLE XV.

AMENDMENTS.

These By-Laws may be amended at the annual meeting, or at a special meeting called for the purpose, by a vote of a majority of the members of the Club in good standing; *provided*, the amendment to be acted upon must be offered in writing and a printed copy of the same sent to each member at least one week prior to the meeting.

ARTICLE XVI.

SEAL (IF INCORPORATED.)

The seal of this Club shall be a circle having round the inner side of the circumference the words (*insert name and location of club*); and in the centre the word "Incorporated 192-..."

CANALS AND CANAL COMPANIES

See Common Carrier; Corporations; Death by Wrongful Act, etc.

- § 1. Creation of canal companies; costs
- § 2. Laws controlling canals
- § 3. Mill canals.
- § 4. Canals as lawful fences
- § 5. Lien against canal companies for labor
- § 6. Suits and process against canal companies
- § 7. Obstructing or injuring canal
- § 8. Crossings
- § 9. Sale, etc., where State interested
- § 10. Connecting with works of another
- § 11. Extending work into other states and branches
- § 12. Examination by State Corporation Commission, etc.
- § 13. Taxation of canal companies—see *Taxation and Tax Bill*

§ 1. **Creation of canal companies; costs.**—They are organized like other public service corporations (other than railroads). See *Corporations*, section 4; for costs, see section 5.

§ 2. **Laws controlling canals.**—The general provisions of the Code as to corporations in general (Code, §§ 3776-3848, and Acts 1920, pp. 489, 594, 565, amending §§ 3780, 3846, 3847, respectively); the general provisions of the Code as to public service corporations (§§ 3881-3903, and Acts 1920, pp. 411, 20, amending §§ 3885, 3897, respectively); and the chapter as to transportation companies generally (§§ 3904-35, and Acts 1920, pp. 234, 618, 20, amending §§ 3905, 3918, 3935, respectively), apply to canal companies—see *Corporations* and *Common Carrier*; and sections 4020-22 (as to tolls) have exclusive application to them.

§ 3. **Mill canals.**—As to leave to cut or enlarge such canals, see sections 3582-90, of Code. The court may allow drainage culverts under mill canals. (Code, § 5297.) See *Mills*.

§ 4. **Canals as lawful fences.**—The court may enter an order to that effect. (Code, § 3553.) See *Fences*.

§ 5. **Lien against canal companies for labor.**—See sections 6438-9 of Code. See *Liens of Mechanics and Others*.

§ 6. **Process against canal companies.**—See *Corporations*, sections 11 and 12.

§ 7. **Obstructing or injuring canal.**—Maliciously to obstruct, remove, or injure a canal or any bridge or fixture thereof, whereby the life of a passenger or other person on such canal is put in peril, is punishable by penitentiary 2 to 10 years; and if death result, the offense is murder, first or second degree. If the act be committed unlawfully, but not maliciously, the punishment is penitentiary 1 to 3 years, or jail not over 12 months and fine \$100 to \$500. (Code, § 4468.)

§ 8. **Crossings.**—For crossing private lands and wagon-ways over—see Code, § 3883; crossing or changing course of public road—§ 3885; railroad crossing canal—§ 3999.

§ 9. **Sale, etc., where State interested.**—See Code §§ 3889-90.

§ 10. **Connecting with works of another.**—See Code, § 3887.

§ 11. **Extending work into other states and branches.**—See Code, §§ 3867, 3869.

§ 12. **Examination by State Corporation Commission, etc.**—See Code, §§ 3717-19, 3721.

§ 13. **Taxation of canal companies.**—See special act as to—Acts 1918, p. 683, and *Taxation and Tax Bill*.

CANCELLATION OF WRITINGS

See Alteration of Writings

- § 1. Of deeds
- § 2. Of contracts
- § 3. Of negotiable instruments
- § 4. Of wills
- § 5. Suits to cancel instruments

§ 1. **Of deeds.**—In the case of a conveyance, the cancelling, tearing, or destroying the deed, though by mutual consent, will not operate to revest the land in the grantor; for a freehold estate, or an estate for a term of more than five years, can be conveyed only by deed or will. (Code, § 5141). See *Conveyances*, section 17.

§ 2. **Of contracts.**—But contracts can by mutual consent be cancelled, torn up, or destroyed so as to be no longer binding. (2 M.'s Real Prop., § 1194.)

§ 3. **Of negotiable instruments.**—A negotiable instrument may be discharged by the holder's intentionally cancelling it. If the cancellation is unintentional, or under a mistake, or without the holder's authority, it is not discharged; but where an instrument or signature appears to be cancelled, the burden of proof is on one who desires to show the contrary. A person secondarily liable on an instrument (as, an endorser), is discharged by the intentional cancellation of his signature by the holder. (Code, §§ 5681-2, 5685.)

Where the date and signature on a negotiable note had both apparently been destroyed by burning, the presump-

tion is that the burning was intentional and done for the purpose of cancelling the instrument; and this presumption can be overcome only by evidence showing that such burning was done unintentionally, or under a mistake, or without authority (121 Va., 86).

§ 4. **Of wills.**—A will may be revoked by the person making it, or some one in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling, or destroying it or the signature thereto, with the intent to revoke it. (Code, § 5233). See *Wills*, section 6.

§ 5. **Suits to cancel instruments.**—The court will decree the cancellation or rescission of a writing for a mistake in fact or for fraud. See *Rescission*.

CAPIAS

- § 1. Capias ad respondendum
- § 2. Capias ad satisfaciendum
- § 3. Capias to answer indictment
- § 4. Capias to hear judgment
- § 5. Capias pro fine
 - (1) When issues
 - (2) When court or judge may release prisoner
 - (3) Limitation of imprisonment
 - (4) When and how prisoner hired out to pay fine
 - (5) State convict road force

Capias means "You take," i. e., the body of the defendant or offender. In Virginia, the writ is used for four purposes:

§ 1. **Capias ad respondendum.**—Literally, "You take to respond." It is used in Virginia in the case of absconding debtors. See *Absconding Debtors*.

§ 2. **Capias ad satisfaciendum.**—Literally, "You take to satisfy," i. e., arrest the debtor until he pays. This writ has long since been abolished in Virginia as too harsh for these modern days. (Code, § 6480.)

§ 3. **Capias to answer indictment.**—This is used in felony cases; and in misdemeanors where the punishment may

be imprisonment, the judge issues a capias or summons. A capias may also be used after a summons has been returned executed and the defendant fails to appear, or has been returned not found, or where a bailed defendant fails to appear. The court may award several capias against the same person to officers of different counties, towns, or cities. If the accused is let to bail, the officer gives him a certificate which protects him against any other capias for the same offense. The writ is mailed to the officer in other counties, etc. Where the process is issued during term, it may be executed anywhere in the State. If not bailed, the accused is delivered to the court, or to the jailor. In misdemeanor cases, after a summons has been executed 10 days before court, or if the accused was admitted to bail and makes default, the court may either award a capias or try him in his absence. (Code, §§ 4881-9.)

§ 4. **Capias to hear judgment.**—No capias to hear judgment for a misdemeanor is now necessary, but if the judgment requires confinement in jail, the court may make an order for his arrest. (Code, § 4883.)

§ 5. **Capias pro fine.**—(1) *When issues.*—The court may, of its own motion, or at the instance of the commonwealth's attorney, commit to jail for fine and costs, or for costs; or the court or judge in vacation may direct the clerk to issue the capias pro fine before or after the return of an execution. If not so directed, an execution issues first, immediately after the term, returnable within 90 days. The court may for good cause shown, direct an execution to issue during the term. If an execution is returned not satisfied, a capias pro fine issues within 5 days after the next term, unless the court at such term, for good cause, directs otherwise. The officer gets 5 per cent. for collection of fine. (Code, §§ 2559-61.)

(2) *When court or judge may release prisoner.*—The court or judge in vacation, if it appear proper, may release from jail a person therein under a capias pro fine, or for a fine and costs, or for costs, but the commonwealth's attorney must have 5 days' notice of the application. (Code, § 4952.)

(3) *Limitation of imprisonment.*—The imprisonment under a capias pro fine, or for fine and costs, or for costs, is fixed according to the amount, as follows: 10 days for less than \$5; 20 days for less than \$10; 30 days for less than \$25; 60 days for less than \$50; 90 days for \$50 or over. But, after

his release, an execution may issue. (Code, § 4953; see § 4949.)

(4) *When and how prisoner hired out to pay fine.*—A person in jail under a *capias pro fine*, or for fine and costs, may, with the consent of the prisoner, be hired out, for a period of not over 6 months, to any one who will agree to pay the fine and costs, taking from him an obligation with surety for that purpose; and if the prisoner fails to comply with the contract, he may, on affidavit of the hirer, be retaken under another *capias pro fine*, which, however, does not affect the obligation taken. (Code, §§ 4950-1.)

(5) *State Convict Road Force.*—A person in jail under a *capias pro fine*, or for a fine, or misdemeanor, may be directed by the judge, upon written request of the superintendent of the penitentiary, to work in the state convict road force. (Code, §§ 2075, 2094-6, 3061.)

CARRIERS (PRIVATE)

See Common Carriers

- § 1. Definition
- § 2. Liability
- § 3. Service of process or notice on

A carrier is one who undertakes to transport persons or property from one place to another. There are two kinds, private and public. The latter are called "common carriers." *See Common Carrier.*

§ 1. **Definition.**—A private carrier is one who does not hold himself out to the public to carry goods, but undertakes to do so in a particular case, either with or without reward.

§ 2. **Liability.**—Private carriers are liable as bailees. Thus: If he is a carrier without compensation, he is held to only slight care or diligence, and liable for injuries resulting from gross negligence only; if a carrier for compensation, he is held to ordinary care or diligence, and liable for injuries resulting from ordinary negligence. *See Bailment.*

§ 3. **Service of process or notice on.**—See Code, § 6067, and Suits and Actions, section 3,

CAVEAT EMPTOR.

Caveat emptor (let the purchaser be aware), applies to a purchaser of defective legal titles, but not to latent equities or rights. Equitable rights may be lost by sale; legal rights never can, unless there be fraud, as a prior lienholder standing by while another purchases without giving notice of his lien. In every sale of real estate the purchaser's relief is to be had on the covenants of title. (1 Wash. 38, 212, 217; 2 Munf., 314.)

The maxim of caveat emptor strictly applies to all judicial sales. The court undertakes to sell only such title as the party has, and it is the purchaser's duty to see if the title is good. If he finds the title not good, he must present his objections to the court before confirmation of the sale. (29 Grat. 347; 77 Va., 135; 80 Va., 22, 30; 82 Va., 937, 945; 83 Va., 331.) The sale may be set aside afterwards, for after-discovered mutual, mistake or fraud. (83 Va., 335.)

In sales of personal property, the seller warrants the title, but not the quality. As to quality, the purchaser buys at his own risk, unless the seller gives an express warranty, or the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller is guilty of fraudulent representation or concealment as to a material inducement to the sale. The buyer must take notice of such qualities of the goods as are reasonably noticeable. If a sale is by sample, a warranty of quality is implied; if not, caveat emptor applies. Bouvier's Law Dictionary, title, *Caveat Emptor*; 78 Va., 254, 265-6.) See, also, *Sales or Exchange of Personal Property*, sections 9, 10.

CERTIORARI

See "*Burks' Pleading and Practice*" (new ed.)

- § 1. Definition
- § 2. Statutory provisions

§ 1. **Definition.**—This is a writ issued to an inferior court (as, a circuit or corporation court), commanding it to certify the record or proceedings in a particular case, (1) to

be proceeded with in the superior court (as, the Supreme Court), as if it had originated there; or (2) in order that the superior court may inspect the proceedings and decide whether there has been any material irregularity therein, and if so, quash them; or (3) to obtain a fuller and more complete transcript (as, in case of appeal or writ of error), where, by accident or design, the copy first returned appears to be imperfect. (4 Min. Inst., 366.)

§ 2. **Statutory provisions.**—See Code, §§ 4933, 5890, 6053, 6345.

CHAIN GANG

See "State Convict Road Force", under *Roads, Bridges, etc.*

§ 1. County chain gangs abolished

§ 2. How persons confined in jail may be put to work on roads

§ 3. Jailor to take receipt; relieved from liability; to make reports

§ 4. Jail prisoners on road or quarry force to be allowed credit for good behavior

§ 5. At what rate prisoners required to work out fine and costs; what statement to be given to person in charge of chain gang; limitation of service

§ 6. A person convicted of misdemeanor may be sentenced to the State Convict Road Force

§ 7. How chain gang in cities established

§ 7. **County chain gangs abolished.**—In view of the laws in relation to the State Convict Road Force, county chain gangs have been abolished. (See Revisors' Note to § 2083 of Code.)

§ 1. **How persons confined in jail may be put to work on roads.**—"By section 2075 of the Code, as amended by Acts 1922: "Upon written request of the superintendent of the penitentiary, the judge of the circuit court of any county or the judge of the corporation court of any city, shall, in term or vacation, unless any such prisoner shows to said judge good cause to the contrary, order any male person convicted of a misdemeanor, or of any offense deemed infamous in law, and sentenced to confinement in jail as a punishment, or part punishment for such offense, or who is imprisoned for failure

to pay any fine imposed upon or assessed against him upon such conviction, or who is imprisoned for a violation of an ordinance of any city or town which by said ordinance is punishable by confinement in jail or fine, to be delivered by the jailor of such county or city, to or upon the order of the superintendent of the penitentiary, to work in the State convict road force, and when such request has been so made by the superintendent of the penitentiary, it shall be deemed to be a continuing request until it has been revoked by the superintendent. No one so confined who is under the age of eighteen years shall be so delivered, and the delivery of any such one over the age of eighteen and under the age of twenty-one years shall be discretionary with the court or judge, and persons over the age of eighteen years or sentenced to jail for not more than 30 days for offenses against the Commonwealth, or if for more than thirty days, pending their delivery as members of the State Convict Road Force, imprisoned for violation of city, town or county ordinances shall be liable primarily to work on chain-gang or public works within such cities, towns or counties at the request of the proper authorities thereof. Any person so sentenced to such chain-gang or public works under this section, shall have the right of appeal from such sentence to the circuit or corporation court, as the case may be."

§3. Jailor to take receipt; relieved from liability; to make reports.—By section 2076: "The jailor shall take a receipt for every person delivered by him under such order, which shall discharge said jailor from all liability for the escape of such prisoner, and he shall deliver to the superintendent of the penitentiary, to the Auditor of Public Accounts, to the clerk of the circuit or corporation court, and to the clerk of the council of the city, if of a city, and to the clerk of the council of the town, if of a town, if any such prisoner is committed for violation of city or town ordinances, a report, setting forth the name of his jail, the name of each prisoner delivered by him to the superintendent of the penitentiary, with the date of such delivery, the length of the sentence for which such prisoner is committed to the jail, the time such prisoner has served on his sentence and the number of days he would have to serve to complete his term, and whether convicted of a city or town ordinance or under State law."

§ 4. Jail prisoners on road or quarry force to be allowed credit for good behavior.—By section 2094 of the Code, as amended by Acts 1920, § 11: "All persons sentenced by any of the courts of this Commonwealth, or by a justice of the peace, to work on the public roads or in public quarries, in lieu of jail sentence, and all persons confined in jail who are worked on said road or quarry force, shall be allowed credit for good behavior on their sentences to the same extent up the same terms as are provided for convicts in the penitentiary. When any prisoner is sentenced by any court or justice to work on the public roads or quarries, it shall be the duty of the judge or justice immediately to notify the superintendent of such sentence in each case."

§5. At white rate prisoner required to work out fine and costs; what statement to be given to person in charge of chain gang; limitation of service.—By section 2095: "Every person held to labor, under the provisions of this chapter, for the non-payment of any fine imposed upon him, shall be required to work out the full amount thereof, including the legal costs, at the rate of fifty cents per day for each day so held, Sundays excepted, and shall be entitled to a credit of twenty-five cents for each day of his confinement, whether he labors or not. A statement of the amount of the fine, with the costs and the number of days' labor required to discharge the same, shall be made out under the direction of the officer imposing the fine, and delivered to the person in charge of the chain-gang or superintendent of the convict road force at the time he receives the delinquent. No person shall be held to labor in any chain gang for the non-payment of any fine imposed upon him for a longer period than six months."

§ 6. A person convicted of misdemeanor may be sentenced to the State convict road force.—By section 2096: "Whenever a male person over eighteen years of age is convicted of any misdemeanor for which a jail sentence may be imposed, either for a fixed period of time, or a sentence to serve in default of payment of fine or in default of surety, the judge or justice before whom such a case is tried may, in his discretion, in lieu of committing said person to jail, sentence him to a like period on the public roads, and cause him to be delivered into the custody of the superintendent of the penitentiary, to be kept by him as a member of the State convict road

force, in accordance with law, and subject to work on the public roads."

§7. How chain gangs for cities established.—By section 3061: "The council of each city may establish chain gangs in such city under such regulations as the council of said city may prescribe, for the purpose of working on the streets, roads and public property therein, farms owned or leased by such city, and of working in or on any other public property or works owned, leased or operated by such city, whether the same be located within such city or in the county where such city is situated. Every male person above the age of eighteen years, who is convicted for any violation of an ordinance of any such city, which by such ordinance is punishable by confinement in jail or fine, and who is imprisoned as a punishment or for failure to pay such fine, shall be liable to work in such chain gang; but nothing in this section shall abridge the right of the proper authorities to send minors to the reformatories of the State. In every city which does not maintain a chain gang within the meaning of this section, the provisions of section 2075 shall apply."

Where clothing is furnished such prisoners, the city pays for them—Code, § 4956.

CHATTEL MORTGAGE

See Deed of Trust, and Mortgage

- § 1. Definition
- § 2. Difference between chattel mortgage and pledge
- § 3. Difference between chattel mortgage and conditional sale
- § 4. Difference between chattel mortgage and deed of trust
- § 5. When bill of sale construed to be a chattel mortgage
- § 6. Form of chattel mortgage

§ 1. Definition.—A chattel mortgage is a lien created by the conveyance by a debtor (called mortgagor) to a creditor (called mortgagee) of personal property by way of pledge or in trust, to secure the payment of money.

§ 2. Difference between chattel mortgage and pledge.—A chattel mortgage differs from a pledge or pawn, in this: a chattel mortgage is usually in writing, and the possession is

either with the mortgagor or mortgagee, according to the contract, and the writing must be recorded so as to be good against creditors and subsequent purchasers, as in the case of other deeds (Code, §§ 5194, 5197); while in the case of a pledge (which is also a transfer of personal property as security for a debt, called "collateral security," in case of notes and bonds, as, where one borrows money and gives his watch or notes as security), the possession is with the creditor or pledgee, and the lien is good against creditors and purchasers with or without notice. In the case of a chattle mortgage, the mortgagee cannot, upon default, even where the writing so provides, sell, but must go into a court of equity to enforce or foreclose the mortgage; while in the case of a pledge, the pledgee may, upon default, after reasonable notice to the debtor (or pledgor), to redeem and of the time and place of sale, sell the property at public auction, or, if the contract so provides, the sale may be privately and without notice; but in either case the sale must be made in good faith. (See general common law authorities.) For the general law of pledges and pawns, which are bailments, see *Bailment*, and "Pawn-brokers," under *Licenses and License Taxes*. (Section 6449 of the Code, providing for sale in case of a bailee "having a lien as such at common law on personal property in his possession, which he has no power to sell for the satisfaction of the lien," does not apply to a pledge, as a pledgee does have the power to sell at common law.)

§ 3. Difference between chattel mortgage and conditional sale.—In a chattel mortgage a lien is given to secure a debt, and possession usually remains with the mortgagor; while in a conditional sale (including reservation of title or lien), there is a sale of the property, and the possession passes to the purchaser, but the title or a lien is reserved until all or the balance of the purchase money is paid; or the sale or transfer of title is made to depend on some other condition. The remedy is also different. See *Conditional Sale or Reservation Title or Lien*.

It is oftentimes doubtful whether a writing is a conditional sale or mortgage. Oral evidence is admissible to show which. Courts lean in favor of a mortgage. (See general common law authorities.)

§ 4. Difference between chattel mortgage and deed of trust.—The chattel mortgage is made to the creditor, on condition to be void if the debt secured is paid when due; while a deed of trust is made to a third person, called trustee, in trust to sell, if the debt is not paid when due. The statute (Code, § 2442), tells how a deed of trust is enforced, while a mortgage is foreclosed or enforced in a court of equity. Chattel mortgages are but little used in Virginia, deeds of trust taking their place. See *Deed of Trust*.

§ 5. When bill of sale construed to be a chattel mortgage.—A bill of sale in proper form may be proved by oral evidence to be made for the purpose of securing a debt, when it will be construed to be a chattel mortgage, and the debtor may, within a reasonable time after default, go into a court of equity and redeem the property by paying the debt. (See general common law authorities.)

§ 6. Form of chattel mortgage.

This deed, made this the _____ day of _____, 192__, between M. D., party of the first part, and M. E., party of the second part,

WITNESSETH:

That the said M. D. doth sell, grant, and convey unto the said M. E., for the purpose of securing the payment by the said M. D., to the said M. E., the sum of \$_____, evidenced by the note of the said M. D., to the said M. E., for the said sum, of even date herewith, payable _____ months after date, with interest from date, doth hereby sell, assign, transfer and convey unto the said M. E., with general warranty, the following described personal property: [here describe the property]

But this deed is made upon this express condition, that if the said M. D. shall pay or cause to be paid unto the said M. E. the said note, with interest, then this deed shall be null and void; otherwise to remain in full force and virtue.

Witness the following signature and seal.

|

M. D. (SEAL.)

CHEATS, FALSE PRETENSES, DECEITS, AND OTHER FRAUDS

See *Embezzlement; Contracts; Fraudulent and Voluntary Conveyances; Gambling or Gaming; Hotels; Offsets; Trade Marks*

I. CRIMINAL CASES.

- § 1. General statute as to false pretense or token
- § 2. Making false statement to obtain property or credit; how punished
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II. CIVIL CASES

- § 22. Requisites of deceit or fraud
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I. CRIMINAL CASES

§1. General statute as to false pretense or token.— "By section 4459 of the Code: "If any person obtain, by any false

pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery. he shall be confined in the penitentiary not less than two nor more than ten years."

A false pretense, under the statute, is such a designed misrepresentation of an existing condition as induces the party to whom it is made to part with his property—e. g., obtaining money under a false pretense of a bet not made, of an agency not existing, of a payment not made, of a balance in a bank on which a check is drawn; or generally, where there is a false representation as to the defendant's means or character, or as to the nature or value of goods or other property; and in every case where the false pretense creates the credit, or, as our Supreme Court puts it, "the false pretense, either with or without other causes, must have had a decisive influence upon the mind of the owner, so that without their weight he would not have parted with his property."

But a "puff," mere brag, loose talk, or the statement of a vague conjectural opinion, is not within the statute. A "puff" is distinguished from a false pretense in this: the former is a general estimate loosely given as a matter of opinion, whereas the latter is a false statement of a fact known to be false. Nor are promises, however fraudulent, within the statute; for the pretense must relate to a past or present state of things.

A false token is some real visible mark or thing, such as a key, ring or the like, presented by the party as coming from a third person, by which the person defrauded is deceived; and under the statute, it need not be a public token, as it must be at common law, but may be a private token as well.

To constitute the offense described in the statute, among other requisites, the pretense or token must be false. But while the burden of proving this negative is on the prosecution, approximate proof or such as creates a strong probability of falsity, it seems, is sufficient, leaving it to the defendant, if he can, to break down this presumption, by proving the affirmative fact.

The statute says the offense shall be deemed larceny, and the Supreme Court of Virginia holds that this makes the offense larceny, and that an indictment for it may be either for the offense as set forth in the statute or in the common law form for larceny; but in either case, to sustain the prosecution the commonwealth must prove every fact which the statute declares constitutes the offense. And it would seem to follow, therefore, that a justice may draw his warrant of arrest either for larceny or for the specific statutory offense, the former being preferable.

If the warrant be for the statutory offense and not for larceny, care should be taken to state accurately the pretense used, a general allegation that the goods were obtained by false pretenses not being sufficient; the false pretenses must be set out, and the truth of them distinctly negatived, and the evidence must sustain the allegation. It is not necessary, however, that all the allegations, either of pretense or falsehood, should be proved; it will suffice if any allegation of pretense or falsehood is sustained, if it appear that such pretense was the efficient cause of the success of the fraud. And if several persons are present at the time of the false pretense and concur in the fraud, though the words were uttered by one only, all may be included in the same warrant, for the act of one is the act of all. (H.'s G. & M., pp. 207-9; see Code, § 4870.)

§ 2. Making false statement to obtain property or credit; how punished.—By Acts 1918, p. 453: "Any person who shall knowingly make or cause to be made, either directly or indirectly, or through any agency, any false statement in writing, with intent that it shall be relied upon, concerning the financial condition or means or ability of himself to pay, or of any other person for whom he is acting, or of any firm or corporation in which he is interested or for which he is acting, for the purpose of procuring, for his own benefit or for the benefit of such person, firm or corporation, the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, or the making, acceptance, discount, sale or endorsement of a bill of exchange or promissory note; or who knowing that a false statement in writing concerning

the financial condition or means or ability of himself to pay or of any such person, firm or corporation has been made, procures with like intent, upon the faith thereof, for his own benefit, or for the benefit of such person, firm or corporation, any such delivery, payment, loan, credit extension, discount making, acceptance, sale or endorsement, shall, if the value of the thing or the amount of the loan, credit or benefit procured is fifty dollars or more and fails to pay for such loan, credit, or benefit, so procured, be deemed guilty of a misdemeanor and upon conviction thereof be fined not more than five hundred dollars or confined in the jail not more than one year, or if the value be less than that sum, be deemed guilty of a misdemeanor and be fined not more than one hundred dollars or confined in jail not more than three months."

§ 3. False pretense in registration of cattle, horses, etc., or giving false pedigree.—Punishable by fine not over \$500, or jail not over 12 months, or both (Code, § 4460).

§ 4. Sale of goods marked "sterling", or sterling silver.—See Code, § 4461.

§ 5. Sale of goods marked "coin silver".—See Code, § 4462.

§ 6. Regulating sale of merchandise made of gold.—See Code, § 4463.

§ 7. Fraud in the issuance, sale, etc., of stocks, bonds, etc., or city or town lots; how punished.—By section 4465, of the Code: "If any person, including a corporation or association, and the officers or agents thereof, alone or in common with others, having devised or intending to devise any scheme or artifice to defraud by the issuance, sale, promotion, negotiation or distribution of any stocks, bonds, notes or other securities or contracts, or city, town or suburban lots, shall in or for executing such scheme or artifice or in attempting to do so, commit any overt act within this State, such person shall be guilty of a misdemeanor, and, upon conviction, be punished by a fine of not more than five thousand dollars or by confinement in jail for not more than one year, or by both such fine and imprisonment. Prosecutions for violations of this section shall be only by indictment or presentment in the court having jurisdiction."

For the duties of the State Corporation as to such frauds,

see Code, § 3714. For a comprehensive act on frauds of this nature, commonly called the "Bucket Shop" or "Blue Sky" law, entitled, "an act to prevent unfairness, imposition or fraud in the sale or disposition of certain securities herein defined by requiring an inspection and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker, or agent, in the sale of any such securities in the State of Virginia, as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof." See Acts 1920, p. 536.

§ 8. Sale, pledge, etc., of goods, produce, etc., belonging to another and failure to pay over proceeds, deemed larceny.—By section 4453 of the Code: "If any person store or ship goods, wares, merchandise, grain, flour, or other produce or commodity, in his own name, being in the possession thereof for or on account of another, and sell, negotiate, pledge, or hypothecate the same, or part thereof, or the receipt or bill or lading received therefor, and fraudulently fail to account for or pay over to his principal, or the owner of the property, the amount so received on such sale, negotiation, pledge, or hypothecation, he shall be deemed guilty of larceny thereof."

§ 9. Failure to perform promise to deliver crop, or etc., in return for advances, deemed larceny.—By section 4454 of the Code: "If any person obtain from another an advance of money, merchandise, or other thing, upon a promise in writing that he will send or deliver to such other person his crop, or other property, and fraudulently fail or refuse to perform such promise, and also fail to make good such advance, he shall be deemed guilty of the larceny of such money, merchandise, or other thing."

§ 10 In relation to the fraudulent conversion of property held under a trust deed.—By section 4455 of the Code: "Whenever any person is in possession of any personal property, in any capacity, the title or ownership of which he has agreed in writing shall be or remain in another, and such person so in possession shall fraudulently sell, pledge, pawn, or remove from the premises where it has been agreed that

the property shall remain, and refuse to disclose the location thereof, or otherwise dispose of the property without the written consent of the owner or the person in whom the title is, or if such writing be a deed of trust, without the written consent of the trustee or beneficiary in such deed of trust, he shall be deemed guilty of the larceny thereof; and in any prosecution hereunder, the fact that such person, after demand therefor by the person in whom the title or ownership of the property is, or his agent, shall fail or refuse to disclose to such claimant or his agent, the location of the property, or to surrender the same, shall be prima facie evidence of the violation of the provisions of this section. This section shall not be construed to interfere with the rights of any innocent third party purchasing said property, unless such writing shall be docketed or recorded as provided by law."

§ 11. Removal, etc., of goods distrained or levied on with intent, etc., larceny.—By section 4447 of the Code: "If any person fraudulently remove, destroy, receive, or secrete any goods and chattels that have been distrained or levied on, with intent to defeat such distress or levy, he shall be deemed guilty of larceny thereof."

§ 12. Fraudulent failure to render service as farm laborer, larceny.—"If any person, with intent to injure or defraud his employer, enters into a contract of employment, oral or written, or for the performance of personal service to be rendered within one year, in and about the cultivation of the soil and thereby obtains from the land owner, or the person so engaged in cultivation of the soil, money or other thing of value under such contract, and fraudulently refuses to perform such service, or to refund the said money or other thing of value so obtained, shall be deemed guilty of the larceny of the said money or other thing of value so received; provided, however, that prosecutions hereunder shall be commenced within sixty days after breach of such contract." (Acts 1918, p. 312.)

§13. Failure to pay for or refusal to return goods, wares or merchandise delivered for selection or approval larceny in certain cases.—By section 4456 of the Code: "If any person shall solicit and obtain from any licensed merchant any goods, wares or merchandise for examination or approval, and shall thereafter, upon written demand, refuse or fail to return the

same to such merchant in unused condition, or to pay for the same, such person so offending shall be deemed guilty of the larceny thereof. But the provisions of this section shall not apply unless such written demand be made within five days after delivery, and unless the goods, wares or merchandise shall have attached to them or to the package in which they are contained a label, card or tag containing the words, 'Delivered for selection or approval.' "

§ 14. Fraudulent entries, or, etc., with intent, etc., in accounts, by officers or clerks of banks, or joint stock company; how punished.—By section 4457 of the Code: "If any officer or clerk of any bank or joint stock company make, alter, or omit to make any entry in any account kept in such bank, or by such company, with intent, in so doing, to conceal the true state of such account, or to defraud the said bank or company, or to enable or assist any person to obtain money to which he was not entitled, such officer or clerk shall be confined in the penitentiary not less than two nor more than ten years."

§ 15. Destroying or concealing a will; how punished.—By section 4458 of the Code: "If any person fraudulently destroy or conceal any will or codicil, with intent to prevent the probate thereof, he shall be confined in the penitentiary not less than two nor more than five years."

§ 16. Fraudulent use of a check, draft or order.—See *Checks*, section 7.

§ 17. Fraudulently buying certain second-hand articles. See Code, § 4449; and also Acts 1918, p. 485, specially applicable to cities and towns and to articles used by or belonging to certain public companies. For statute as to pig or railroad iron, brass, metal or any composition thereof, see Code, § 4450.

§ 18. Fraudulent use of hired horse, automobile, or other vehicle.—By section 4567 of the Code: "If any person having hired from a licensed livery stable keeper or any other person, any horse, mule, automobile or other vehicle, wilfully or negligently injure or damage the same by hard or reckless riding, driving, or using, or permit any other person so to do, or hire the same to any other person, or procure any horse, mule, automobile or other vehicle from a licensed livery stable keeper, or any other person, without previously making ar-

rangements for credit, and use the same without paying therefor and with intent to cheat or defraud said licensed livery stable keeper, or other person, he shall be fined not less than ten nor more than fifty dollars."

§ 19. Fraudulent issue of fee bills.—See Code, § 4515.

§ 20. Fraud as to jury box or in drawing jurors.—See Code, § 4526.

§ 21. Winning by cheating or other fraud.—By section 4691 of the Code: "If any person playing at any game, or making a wager, or having share in any stake or wager, or betting on the hands or sides of others playing at any game, or making a wager, cheat, or by fraudulent means win or acquire, for himself or another, money or other valuable thing, he shall be confined in jail not exceeding one year, and fined not less than five times the value of the money or thing won or acquired."

II. CIVIL CASES

§ 22. Requisites of deceit or fraud.—To constitute an injury by deceit or fraud, there must have been a representation which was not true, made for the purpose of deceiving or defrauding, and which actually succeeds, causing damage to the party deceived. Any false pretense or token or fraudulent misrepresentation mentioned under section 1, above, or generally in sections 2 to 20, is a deceit or fraud, for which an action for damages lies. (See general common law authorities.)

§ 23. Form of "description" in warrant or indictment.

No. 1. FELONIOUSLY OBTAINING MONEY OR OTHER PROPERTY BY FALSE PRETENCE OR TOKEN.

(Code, § 4459.)

DESCRIPTION:

"did feloniously and falsely pretend and represent to the said A. B. that [here state briefly the false pretense or token used], and did by means of the said false pretence (or *token*) feloniously obtain from the said A. B. [here describe the money or property obtained as in warrants for larceny], of the value of ----- dollars, of the goods and chattels of the said A. B., with intent to defraud."

Or, it seems, instead of the above form, the indictment may be for larceny, which will suffice as well. In any event, if the offense amount only to a misdemeanor, omit "feloniously," and in lieu thereof insert "unlawfully."

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No. 2. OBTAINING BY FALSE PRETENSE OR TOKEN THE SIGNATURE OF A
PERSON TO A WRITING.

(*Idem.*)

DESCRIPTION:

"did feloniously and falsely pretend that [here state the pretense or token used], and did thereby feloniously obtain from the said A. B. his signature to a certain writing, to-wit: a receipt in full of all demands (or other writing, as the case may be), with intent to defraud."

No. 3. FRAUDULENT CONVERSION OR HYPOTHECATION OF MONEY, MERCHANDISE, GRAIN, FLOUR, OR OTHER PRODUCE OR COMMODITY.

(Code, § 4453.)

DESCRIPTION:

"did store (or *ship*), in his own name, ----- bushels of wheat (or other thing), of the value of ----- dollars, being in the possession thereof for and on account of the said A. B., the owner thereof, and afterwards he the said C. D., did sell (or *negotiate, pledge, or hypothecate*) the said ----- bushels of wheat (or a part thereof, or the bill of lading received therefor), and has feloniously and fraudulently failed to account for and pay over to the said A. B. the amount so received on such sale (or *negotiation, pledge, or hypothecation*)."

No. 4. FAILURE TO PERFORM PROMISE TO DELIVER CROP OR OTHER
PROPERTY IN RETURN FOR ADVANCES.

(Code, § 4454.)

DESCRIPTION:

"did obtain from the said A. B. an advance of money (or merchandise, or other thing, describing it) to the amount and value of ----- dollars, upon a promise in writing signed by the said C. D., that he would on the ----- day of -----, 189--, send and deliver [here state and describe the crop or other property to be delivered] to the said A. B., and has feloniously and fraudulently failed and refused to perform said promise.

No. 5. FRAUDULENT ENTRIES IN ACCOUNTS BY AN OFFICER OR CLERK OF
A BANK OR A JOINT-STOCK COMPANY.

(Code, § 4457.)

DESCRIPTION:

"was a clerk (or *an officer*) of the ----- national bank, in said county, and that one P. G. did on that day have an account with the said bank, which account was kept by the said C. D. as clerk (or *officer*) aforesaid, and that the said C. D. did then and there feloniously make (or *alter or omit to make*) an entry in the said account, with intent thereby to defraud the said bank, and to enable and assist the said P. G. to obtain money from the said bank to which he was not entitled."

By simple changes the above form may be adapted to case of a *joint-stock company*.

CHECKS

See Banks and Banking, and Negotiable Instruments

- § 1. Definition
- § 2. How checks should be filled out
- § 3. Check must be presented within reasonable time
- § 4. How payment stopped
- § 5. How to use check as cash
- § 6. Payment after death of drawer
- § 7. Fraudulent use of check, draft, or order
- § 8. When check operates as an assignment
- § 9. Stealing or embezzling a check
- § 10. Forged check
- § 11. Form of a check

§ 1. Definition.—A check is an unconditional order, payable on demand, drawn by one person, called the drawer, in favor of another, called the payee, upon a bank. It is a bill of exchange, and differs from others by being payable at a bank. The law applicable to bills of exchange payable on demand applies to checks. (Code, § 5747). See *Bills of Exchange* and *Negotiable Instruments*.

§ 2. How checks should be filled out.—Checks should be carefully drawn, commencing close to the left-hand end to write the amount, filling the rest of the space to the dollar sign; this is to prevent someone from “raising” the amount. The bank is ordinarily responsible where a check is “raised,” unless the party is grossly negligent in writing the check. See *Alteration of Writings*.

If you wish to draw money from the bank, write “Pay to myself” or “Pay to cash,” and then you need not endorse the check.

If you write a check to one who will have to be identified at the bank, have him endorse the check and below his signature write “Signature O. K.,” and sign your name.

§ 3. Check must be presented within reasonable time.—If not, the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. (Code, § 5748.)

§ 4. How payment stopped.—Payment of a check may be stopped by notice to the bank not to pay it. If a check is lost or stolen, have the maker to give another and to notify the bank not to pay the other.

§ 5. How to use checks as cash.—To prevent delay and have your check received the same as cash when sent to another town, and especially, if sent out of the State, have the cashier to write across it. "Certified," or "Good when properly endorsed," signed and dated by him. This is called a "certified check." The amount is at once charged to the drawer. (Code, § 5749.)

Or better still, have the bank to give you its draft on New York, or other big financial centre.

If the holder procures it to be accepted or certified, the drawer and endorsers are discharged. (Code, § 5751.)

§ 6. Payment after death or drawer.—A bank may pay a check within two weeks from notice of the death of the drawer. See *Banks and Banking*, section 6, (3).

§ 7. Fraudulent use of check, draft, or order.—By Acts 1920, p. 561: "It shall be unlawful for any person to obtain money, or other property of any kind or nature whatever, with fraudulent intent, or to obtain credit with like intent, by means of a check, draft or order, of which such person is maker or drawer, or which though he is not maker or drawer, he, with like intent, utters, or delivers, or aids or abets another to utter or deliver. If such check, draft or order is not paid by the drawee, the person making, drawing or uttering the same shall be deemed guilty of the larceny of such money or property, or thing of value obtained on such credit, and the fact that such maker or drawer did not have on deposit with the bank, person, firm or corporation upon which such check, draft or order is drawn, sufficient funds to pay the same in full when presented, shall as against the maker or drawer of such check, draft or order, be prima facie evidence of fraudulent intent; provided, that if such check, draft or order be paid upon notice or at any time previous to the trial or examination of such person before a justice of the peace, or if such person be not tried or examined, if such check, draft or order be paid before indictment by a grand jury, no such presumption shall arise."

§ 8. When check operates as an assignment.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. (Code, § 5751.)

§ 9. Stealing or embezzling a check.—See *Larceny* and *Embezzlement*.

§ 10. Forged check.—The bank must know at its peril the signature of its customers, and is liable for paying a forged check and cannot charge the depositor with the amount; but where the loss can be traced to the fault or negligence of the drawer or holder, he must suffer it. (3 Min. Inst., 464.) See, also, *Negotiable Instruments*, section 11.

§ 11. Form of a check.

Capron, Virginia, Oct. 6, 1921.

The Seaboard National Bank, of Norfolk, Virginia, pay to the order of B. C., nineteen hundred dollars (\$1900.00).

S. N.

CHURCH AND CHURCH PROPERTY

- § 1. Separation of church and state, and religious freedom
- § 2. Church cannot be incorporated
- § 3. What conveyances, etc., for religious purposes valid
- § 4. Appointment of trustees to effect the purpose of such conveyance, etc.
- § 5. On division of churches, how rights to property determined
- § 6. Suits by and against trustees
- § 7. Forms under "Church and Church Property"

§ 1. Separation of Church and State, and religious freedom.—In Virginia, ever since our independence, there has been a separation of church and state. In 1785, our present act of "Religious Freedom" was passed, and it has remained intact and unchanged to the present day, and the rights asserted therein are declared to be "of the natural rights of mankind." (Code, § 35). Omitting the able argument of the "preamble," and also the conclusion, the act (§ 34 of the Code), provides:

"No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of

religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities."

Section 58, of the Virginia Constitution, which also asserts the above quotation, further provides: "And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within the State to levy on themselves or others any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contracts as he shall please."

By section 16 of the Bill of Rights of the Constitution, it is provided: "That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other."

By section 67, inserted for the first time in the Constitution of 1902: "The General Assembly shall not make any appropriation of public funds, of personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution, which is not owned or controlled by the State; except that it may, in its discretion, make appropriations to non-sectarian institutions for the reform of youthful criminals; but nothing herein contained shall prohibit the General Assembly from authorizing counties, cities, or towns to make such appropriations to any charitable institution or association." And state appropriations to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof, are prohibited except as to William and Mary College, and interest on certain school or college bonds (Va. Const., § 141).

All religions are thus put on a footing of equality,

whether Christian or Jew, Protestant or Roman Catholic, or others (3 Grat., 632). As to Christian Science, see 10 Va. Law Reg., 289.

The State makes a concession to churches, religion and charities in exempting their church buildings, parsonages and furniture, and property of church schools, the Y. M. C. A., or other similar institutes, orphanages, and other benevolent or charitable associations, with adjacent land reasonably necessary for the covenant use of any such building. (Va. Const., § 183, Code, §§ 2272, 2301.)

§ 2. Church cannot be incorporated.—A church or religious denomination cannot be incorporated, but the legislature may secure the title to church property to an extent to be limited by law. (Va. Const., § 59; Code, § 3872.) But a body for carrying on Christian education, etc., like "The Southern Baptist Convention," or the like body of the Presbyterian or other church, can be incorporated. (Guthrie, 1 Va., Dec., 717; 10 S. E., 327.)

§ 3. What conveyances, etc., for religious purposes valid.—Land may be conveyed (but not willed or dedicated), and personal property conveyed and willed, as follows: Land for the use or benefit of any religious congregation as a place for public worship, or as a burial place, or a residence for a bishop or other minister or clergyman who, though not in special charge of a congregation, is yet an officer of such church or religious society, and employed under its authority and about its business; or as a location as a parish house or house for the meeting of societies or committees of the church or others for the transaction of business connected with the church or as a place of residence for the sexton of a church, provided such land lies adjacent to or near by the lot or land on which is situated the church to which it is designed to be appurtenant; and the land shall be held for such uses or benefit or for such purposes, and not otherwise. And no conveyance of land or conveyance or will of personal property made to such church or religious congregation, or the trustees thereof, shall fail or be declared void for insufficient designation of the beneficiaries in, or the objects of, any trust annexed to such conveyance or will in any case where lawful trustees of such church or congregation are in existence, or said congregation is capable of securing the ap-

pointment of such trustees upon application as prescribed in section 39 of the Code (see section 4, below); but such conveyance or will shall be valid, but the trustees shall not take or hold at any one time more than two acres of land in, nor more than 75 acres out, of a city or town; nor money, securities, or other personal estate, exceeding in the aggregate, exclusive of books and furniture (see section 4, below), \$30,000. But whenever the objects of any such trust shall be undefined, or so uncertain as not to admit of specific enforcement by the chancery courts, then the property shall enure and pass to the trustees of the beneficiary congregation, to be by them held, managed, and the principal or income appropriated for the religious and benevolent uses of said congregation, as said trustees may determine, by and with the approval of the vestry, board of deacons, board of stewards, or other authorities which, under the rules or usages of such church or congregation, have charge of the administration of the temporalities (or property) thereof. (Code, §§ 38, 43.) Section 43 also validates prior conveyances and also wills and dedications of land. For an act providing for the conveyance of real property donated to a church, which has been in undisputed possession of it for 25 years or more, see Acts 1918, p. 94; Pollard's Code Biennial, 1920, p. 354.

The "religious congregations" intended include as well those which are united with others under a common government (like the Methodist churches), as those which are independent or "congregational" in their organization and government (like the Baptist churches); but the phrase does not apply to whole denominations or sects, but in the limited and local sense, so as to restrict the benefit of such conveyances, etc., to single congregations, whose members, from their residence at or near the place of worship, may be expected to use it for such a purpose. Hence a conveyance is not good which does not respect the rights of the local society or religious congregation, and which does not design to bestow the property for the use or benefit of that society or congregation. But the conveyance is not less for the use and benefit of the local society, because by its terms it contemplates and sanctions the appointment of a minister, with authority to officiate in the intended place of worship, by a power outside of the congregation (as, in case of a Methodist church

by the bishop or annual conference), without reference to the congregation's vote or wish. (1 Min. Inst., 545-6; 13 Grat., 301, 313-18; 32 Grat., 431; 79 Va., 402.)

While a church cannot take real estate by will, either directly or through trustees, yet if property is willed to a church for a specific purpose, such as a memorial to a deceased relative, the church is not the beneficiary, but a bare trustee, and the will is valid (115 Va., 225; 15 Grat., 423.)

As to charitable, religious and educational trusts, see *Trusts and Trustees*, section 16; and *Wills*, sections 3 and 19, (4).

§ 4. Appointment of trustees to effect the purpose of such conveyance, etc.—By section 39 of the Code: "The circuit court of the county or the circuit or corporation court of the city, or the judge thereof in vacation, wherein there is any parcel of such land or the greater part thereof is, may, on the application of the proper authorities of such religious congregation, church, or religious society or branch or division thereof, from time to time appoint trustees, either where there were, or are, none or in place of former trustees, and change those so appointed whenever it may seem to the court or judge proper to effect and promote the purpose and object of the conveyance, devise, or dedication, and the legal title to such land shall for that purpose and object be vested in the said trustees for the time being and their successors."

By section 41: "When books or furniture shall be given or acquired for the benefit of such religious congregation, church, or religious society, or branch or division thereof, to be used on the said land in the ceremonies of public worship or at the residence of said bishop, or minister, or clergyman, the same shall stand vested in the trustees having the legal title to the said land, to be held by them as the said land is held, and upon the same trusts."

§ 5. On division of churches, how rights to property determined.—By section 40 of the Code: "If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation is attached, the communicants, pew holders, and pew owners of such congregation, over twenty-one years of age, may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter

belong. Such determination shall be reported to the circuit court of the county, or circuit or corporation court of the city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in its chancery order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of this State. If a division has heretofore occurred or shall hereafter occur in a congregation, which in its organization and government is a church or society entirely independent of any other church or general society, a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation. Their decision shall be reported to such court, and if approved by it, shall be so entered as aforesaid, and shall be final as to such right of property so held."

Thus, this section embraces a religious society or church composed of many congregations, like the Methodist church, and also a church composed of but one church congregation, whose government is independent or congregational, like the Baptist church. For the rule in case of divisions prior to the above statute (which was first passed in 1867), as in case of the division of Methodist Episcopal Church in the United States into the Methodist Episcopal Church, and the Methodist Episcopal Church, South, see 13 Grat. 320-4, 3278; 32 Grat. 431-2, 438-40; 1 Min. Inst. 547-8.

Where a contest arises as to the true ownership of a church house between two sets of trustees (in this case by unlawful detainer), the same general principles and rules apply as in a controversy between individuals, as to holding under another, disclaimer of title, adverse possession, etc. (24 Grat. 541-2).

§6. Suits by and against trustees.—By section 42 of the Code, as amended by Acts 1920, page 9: "The said trustees, as such as are mentioned in sections 49, 50 and 51 [as to benevolent associations], may, in their own names, sue for and recover any real or personal estate held by them respectively

in trust, or for damages for injury thereto, and be sued in relation to the same. Such suit, notwithstanding the death of any of the said trustees, or the appointment of others, shall proceed in the names of the trustees by or against whom it was instituted. And in any case where such trustees shall have given any deed of trust, or encumbered such real or personal estate in any manner, to secure any debt and such trustees have since died and such religious congregation or organization become extinct, or has ceased to occupy said property, so that it may be regarded as abandoned property, the beneficiary entitled to the debt secured by such deed of trust, or encumbrance, may institute a chancery suit to subject said estate to the payment of such lien in the circuit or corporation court of the county or corporation in which said property, or the greater part thereof is, against the members of such religious congregation or organization as parties unknown, proceeding by order of publication, as provided by chapter 253."

One or more members may sue trustees to compel proper application of the property (Code, § 44); but such suit cannot be mentioned as to application on church debt of money subscribed for a school in connection with a church (91 Va. 421).

A member may also bring suit to have land belonging to a religious congregation sold or encumbered by deed of trust or mortgage, where the congregation gives its consent thereto in the mode prescribed by its authorities, and the rights of others are not violated thereby, the proceeds to be disposed of as the congregation may desire. (Code, § 45; 32 Grat. 170.) And the trustees may bring a similar suit, by petition in court or before the judge, who may try it in vacation; and where the religious congregation has become extinct or has ceased to occupy the property as a place of worship, so that it may be regarded as abandoned property, the petition may be filed by the surviving trustee or trustees, or by one or more members, or by the religious body which, by the laws of the church or denomination to which the said congregation belongs, has the charge or custody of the property, or in which it may be vested by the laws of the church or denomination; and the court or judge in vacation may decree the sale of the property and the disposition of the proceeds in ac-

cordance with the law of said denomination; and its printed acts issued by its authority, embodied in book or pamphlet form, are regarded as its laws and acts. (Code, § 46.)

But trustees themselves, without court procedure, cannot sell or encumber church property (103 Va. 559, 562). Though where a church was built upon a lot conveyed to trustees on condition that they build thereon a church, etc., and the church was erected and used as long as it was fit to use, and the trustees then sold the property and invested the proceeds in a parsonage for the same congregation, their act was sustained as within their power (87 Va. 125).

§ 7. Forms under "Church and Church Property".—

No. 1. PETITION OF TRUSTEES TO ENCUMBER CHURCH PROPERTY, WITH EXTRACT OF MINUTES AND COURT ORDER.

(Code, § 46; Pollard's Code, Biennial 1920, p. 16.)

IN THE MATTER OF THE RELIGIOUS CONGREGATION OF THE -----
CHURCH.

To the Honorable Judge of the Circuit Court of the County of
-----, Virginia:

Your petitioners, -----, represent that they are trustees for the religious congregation of the ----- Church, appointed by the order of this court entered -----, and recorded in O. B. -----, page -----; that your petitioners hold the legal title to certain real estate situated in ----- in the County of -----, Virginia, which said property is held for the use and benefit of the said religious congregation as a place of public worship; that it is the wish of said congregation that the said property be encumbered by a deed of trust as will appear from a duly authenticated copy of a resolution passed by said congregation, which resolution is verified by affidavit and is herewith filed and marked "Exhibit A. with the petition of the Trustees of ----- Church," and prayed to be read as a part of this petition; that the said resolution describes in full the said property and sets out in words and figures all of the terms and conditions of the deed of trust under which it is the wish of said congregation to encumber said property.

Your petitioners therefore pray this Honorable Court to enter its order in pursuance of Section 46 of the Code of Virginia and acts amendatory thereof, authorizing and directing your petitioners to sign, seal and deliver the said deed of trust encumbering said property as aforesaid.

And your petitioners will ever pray.

Trustees of the ----- Church.

EXTRACT OF MINUTES OF THE MEETING OF THE CONGREGATION OF THE
 ----- CHURCH, DULY CALLED AND HELD AT -----, IN THE
 COUNTY OF -----, VIRGINIA, ON THE ----- DAY OF -----,
 192--, AT ----- O'CLOCK P. M., AT WHICH MEETING THERE WAS A
 QUORUM PRESENT.

On motion it was resolved:

First, That it is the wish of this congregation to encumber its real estate at ----- in the County of -----, Virginia, in the manner and upon the terms and conditions set out in the following deed of trust, to-wit: ----- (here insert deed of trust.)

Second, That the said trustees be instructed to petition the Circuit Court of the County of -----, Virginia, or the Judge thereof in vacation for authority to sign, seal and deliver said deed of trust for and on behalf of this congregation.

Third, That the said trustees be authorized to sign, for and on behalf of this congregation, the notes described in the foregoing deed of trust.

A True Copy.

-----+
 Chairman.

 Secretary.

State of Virginia,
 County of ----- } to-wit:

This day ----- and -----, whose names, as chairman and secretary respectively, are signed to the foregoing writing, personally appeared before me in my said county and made oath before me that the foregoing is a true copy of the minutes of the meeting of the congregation of the ----- Church, duly called and held on the ----- day of -----, 192--, at which meeting there was a quorum present.

Given under my hand this ----- day of -----, 192--.

 N. P.

ORDER.

IN THE MATTER OF THE RELIGIOUS CONGREGATION OF THE ----- CHURCH.

This day came -----, trustees of the religious congregation of the ----- Church, and filed their petition and exhibit therewith setting forth that there is vested in them legal title to certain real estate lying in the County of -----, Virginia, which property is held for the use and benefit of the said religious congregation as a place of public worship, and that it is the wish of said congregation to encumber said property by a deed of trust filed with said petition, which said deed of trust is in the following words and figures, to-wit: ----- [here insert deed of trust.]

And it appearing to the court from a resolution passed by said congregation at a meeting duly called and held, a copy of which said resolution properly authenticated and verified by affidavit, was filed as an exhibit with said petition, with it is the wish of the said con-

gregation to encumber the said property in the manner set forth in said deed of trust.

The court in pursuance of the statutes in such cases made and provided, doth hereby authorize and direct said trustees to sign, seal and deliver said deed of trust.

**NO. 2. TRUST CLAUSE IN CONVEYANCE OF LAND FOR HOUSE OF WORSHIP
TO M. E. CHURCH, SOUTH.
(Discipline 1918, par. 490.)**

"In trust, that the said premises shall be used, kept, maintained, and disposed of, as a place of divine worship for the use of the ministry and membership of the Methodist Episcopal Church, South; subject to the discipline, usage, and ministerial appointments of said Church, as from time to time authorized and declared by the General Conference of said Church, and by the Annual Conference within whose bounds the said premises are situated."

**NO. 3. TRUST CLAUSE IN CONVEYANCE OF LAND FOR PARSONAGE
(Discipline 1920, par. 493.)**

"In trust, that such premises shall be held, kept, maintained, and disposed of, as a place of residence for the use and occupancy of the preachers of the Methodist Episcopal Church, South, who may from time to time be appointed in said place; subject to the usage and discipline of said Church, as from time to time authorized and declared by the General Conference of said Church, and by the Annual Conference within whose bounds the said premises are situated."

CIGARETTES

- § 1. Giving or selling to minors
- § 2. Opium in cigarettes prohibited

§ 1. Giving or selling to minors.—To give, sell, or furnish cigarettes to a minor under 16 years of age, having good reason to believe him or her to be under that age, is punishable by a fine of \$10 to \$100. (Code, § 4695.)

§ 2. Opium in cigarettes prohibited.—The manufacturer is prohibited from using opium in cigarettes or the wrappers, under penalty of \$100 to \$1,000, or jail not under six months, or both. (Code, § 4696.)

CIRCUIT COURTS.

See "Burks' Pleading & Practice (new ed.), title *Courts*

- § 1. Special chapter as to
- § 2. General provisions as to courts
- § 3. Jurisdiction to decide "moot" questions

§ 1. **Special chapter as to.**—See Code, §§ 5887-5904, and Acts 1918, pp. 6, 277, 424, affecting § 5893, and Acts 1920, pp. 600, 123, 8, 572, amending §§ 5888, 5889, 5893, 5898, respectively, and Acts 1922, amending § 5887.

§ 2. **General provisions as to courts.**—See *Courts (General Provisions as to)*.

§ 3. **Jurisdiction to hear and decide "moot" questions.**—See Acts 1922, p.—, for an act "To grant jurisdiction to all courts of record to make binding declarations of rights and determine questions of construction, whether any consequential relief is or could be claimed, or not, and to prescribe where, and how, and with what effect suits seeking the exercise of such jurisdiction shall be brought and conducted, and how this act shall be construed."

CITIES AND TOWNS

See *Dedication*

I. STATUTES AS TO CITIES AND TOWNS IN GENERAL

- § 1. Definitions of city and town
- § 2. Survey and plan of cities and towns
- § 3. Extension of corporate limits or consolidation
- § 4. Contraction of corporate limits
- § 5. Councilman to hold no other city or town office
- § 6. Rules and officers of councils; investigations by councils and by boards of fire and police commissioners
- § 7. Quorum; passage of money ordinance
- § 8. Powers and duties of police force
- § 9. How far jurisdiction of cities and towns extends
- § 10. Granting of franchise, etc., by cities and towns; selling city property
- § 11. Bond issue
- § 12. General and enumerated powers of councils of cities and towns

- § 13. Statutes conferring other powers on cities and towns
- § 14. Local assessment upon abutting landowners for sidewalks, alleys, and sewers
- § 15. Licenses
- § 16. Farmers may sell farm products in city or town (outside market or sheds) without license or tax
- § 17. City and town levies
- § 18. Disbursement of moneys; claims allowed to be posted and published
- § 19. As to fires in cities and towns
- § 20. Effect of statutes on charters of cities and towns
- § 21. How charter amended
- § 22. Changes in form of government

II. STATUTES AS TO TOWNS

- § 23. Town sergeants
- § 24. How town election conducted
- § 25. When and how town officers qualify
- § 26. Election of mayor and councilmen of towns; other town officers
- § 27. Oath of town councilmen; oath of mayor
- § 28. Town council to judge election returns; may punish or expel members; order new election; how vacancies filled
- § 29. Charter granted amended, or annulled by court.
- § 30. Council may suspend or remove other town officers.
- § 31. Mayor or councilmen of town has powers and authority of a justice; appeal from his decision
- § 32. How town council convened.
- § 33. Proceedings of town councils; mayor to preside; salary of mayor
- § 34. Bond issue
- § 34. Elections to decide upon bond issue
- § 35. Borrowing money and issuing bonds for public improvements

III. STATUTES AS TO CITIES

- § 36. Enumeration of population and formation of city
- § 37. Change of wards
- § 38. Council, how composed; terms of service
- § 39. Council to reapportion representation among wards; when to change wards
- § 40. Council to fill vacancies
- § 41. Presiding officers of city councils; their duties
- § 42. Term, duties, pay, and liabilities of clerks of city courts and city attorney
- § 43. Powers and duties of police force
- § 44. Duties, pay and liabilities of city sergeant
- § 45. Election of mayor, council, and other city officers; deputies
- § 46. Veto power of mayor of city; how ordinance passed over veto
- § 47. City justices and their jurisdiction

- § 48. Preservation of order at races, fairs, baseball and football games, etc., in cities
- § 49. How chain gang or county farm established
- § 50. Matrons of jails in cities of 40,000 or more
- § 51. Public defender in cities of 100,000 to 160,000

IV. MUNICIPAL LAW GENERALLY

- § 52. Creation and government of cities and towns
- § 53. General powers of cities and towns
- § 54. How streets, alleys, parks, and other public property acquired
- § 55. Abandoning streets
- § 56. Rights of abutting owner in street:
 - (1) In general
 - (2) As to surface street car lines
 - (3) As to steam railways
 - (4) Rights of city or town as to soil, stone, trees, etc., in street
 - (5) As to projecting or overhead structures
 - (6) As to gas, water and sewer pipes, and electric lighting
 - (7) Abutter's rights and liabilities as to areas, vaults cellars, etc., in and under street:
 - (a) Abutter's rights
 - (b) Abutter's liability
 - (8) As to removal of snow and ice from sidewalks
 - (9) Using streets or sidewalks for business purposes
- § 57. Liability of city or town for damages in grading streets
- § 58. Liability of city or town for condition of streets, sidewalks, etc.
- § 59. General liability of city or town for negligent injuries
 - (1) When not liable
 - (2) When liable
- § 60. As to punitive damages against city or town
- § 61. Ordinances of city or town
- § 62. Garnishment of cities and towns
- § 63. Execution of mechanic's lien against city or town
- § 64. City or town bonds
- § 65. As to right to exempt from taxation
- § 66. Local assessments for sidewalks, alleys, and sewers

For convenience, this subject is arranged under the following heads: (1) Statutes as to Cities and Towns in General; (2) Statutes as to Towns; (3) Statutes as to Cities; (4) Municipal Law Generally.

I. STATUTES AS TO CITIES AND TOWNS IN GENERAL

§ 1. **Definition of city and town.**—A city has 5,000 population; a town has less than 5,000. (Va. Const., § 116; Code,

§ 5 (16); § 2972.) A city or town is also called an "incorporated community," or "municipal corporation" or "municipality."

§ 2. Survey and plan of cities and towns.—This is to be made and recorded in the clerk's office, and is *prima facie* evidence of the boundaries of the lots, streets and alleys. (Code, § 2977.)

§ 3. Extension of corporate limits or consolidation.—See Const., § 126; Code, §§ 2956-68, and Acts 1920, p. 210, amending § 2958. For consolidation of towns, see Acts 1920, p. 417. For consolidation and annexation of cities, see Acts 1922.

§ 4. Contraction of corporate limits.—See Code, §§ 2969-71, and Acts 1918, p. 401, amending § 2969. For contraction, where town is located partly in another county, see Acts 1920, p. 310.

§ 5. Councilman to hold no other city or town office.—See Code, § 2982.

§ 6. Rules and officers of councils; investigations by councils and by boards of fire and police commissioners.—See Code, § 2985.

§ 7. Quorum; passage of money ordinance.—See Code, § 2986.

§ 8. Powers and duties of police force.—See Code, § 2991.

§ 9. How far jurisdiction of cities and towns extends.—In criminal matters and as to license tax on "shows, performances and exhibitions," it extends one mile beyond the corporate limits. (Code, § 3006.)

§ 10. Granting of franchise, etc., by cities and towns; selling city property.—See Va. Const., §§ 124-25; Code, §§ 3016-24, and Acts 1918, pp. 463, 465, amending § 3017, and Acts 1918, p. 137, as to sale of water to another city.

§ 11. Bond issue.—(1) As to maximum amount of bond issue, see Va. Const., § 127.

(2) Council may exempt their bonds from local taxation. (Code, § 2302.)

(3) Method of voting on bond issue. (Code, §§ 3082-91, and Acts 1922, amending §§ 3082, 3084.)

§ 12. General powers.—By section 3034 of the Code: "Councils of cities and towns, for the purpose of carrying into

effect the enumerated powers conferred upon them by this chapter and any other powers conferred upon them by law, may make ordinances and by-laws and prescribe fines or other punishment for violation thereof, keep a city or town guard, appoint a collector of its taxes and levies, and such other officers as they may deem proper, define their powers, prescribe their duties and compensation, and take from any of them a bond, with sureties, in such penalty as to the council may seem fit, payable to the city or town by its corporate name, and with condition for the faithful discharge of the said duties. Cities and towns of this Commonwealth are authorized to make appropriations of public funds of personal property, or of any real estate to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society. The words 'sectarian society' shall not be construed to mean a non-denominational young men's Christian association or a non-denominational women's Christian association. Nothing in this section shall be construed to prohibit any city from making contracts with any sectarian institution for the care of indigent, sick, or injured persons. But no property shall be condemned for the purposes specified in this or the four preceding sections (see section 13 (18) to (21), below), unless the necessity therefor shall be shown to exist to the satisfaction of the court having jurisdiction of the case, and no property of any public service corporation, except lands required for drains, sewers or public ducts shall be condemned except in accordance with sections 3832-3 and 3042 (as to condemning property of other corporations). The provisions of this chapter shall in no wise repeal, amend, impair or affect any other power, right or privilege conferred on cities and towns by charter or any other provisions of the general law." As to building districts, see Acts 1922.

§ 13. Statutes conferring other powers on cities and towns.—The legislature has supplemented the foregoing powers of cities and towns by the following statutes:

(1) To prohibit a license tax on newspapers. (Code, § 3062.)

(2) To prevent interference with scholars at female schools in cities and towns. (Code, § 3063.)

- (3) To authorize contract with sewerage or water purification company, etc. (Code, § 3064.)
- (4) As to bond issue, see section 11, above.
- (5) To grant franchises—see section 10, above.
- (6) To erect dams across water courses. (Code, §§ 3054-60.)
- (7) As to opening streets or alleys through public property. (Code, § 3041.)
- (8) To make special levies for pensions. (Code, §§ 2662-7.)
- (9) To acquire property near park, monuments and other public property, and dispose of same. (Code, § 3065.)
- (10) To continue operation of public utilities leased or purchased. (Code, § 3017, as amended by Acts 1918, pp. 463, 465.)
- (11) To condemn, abandoned, etc., cemeteries, and to dispose of the dead. (Code, §§ 54, 55.)
- (12) To appoint certain officers and employees in addition to charter officers, and to fill vacancies. (Code, § 2988.)
- (13) To authorize establishment of free public libraries and reading rooms. (Code, § 3074.)
- (14) To authorize designation of segregation districts for white and colored persons. (Code, §§ 3043-53.)
- (15) Streets, etc., not to be used for certain purposes without consent of corporate authorities. (Code, § 3014.)
- (16) To adopt ordinances to permit awnings, signs, cornices, bay windows, etc., to overhang streets. (Code, § 3015.)
- (17) Assessment of property same as that for State taxation and same penalty for non-payment. (Code, § 3025, 3066.)
- (18) Powers as to streets, public grounds and buildings, and control of same; markets, nuisances, powder and combustibles; cemeteries. (Code, § 3030.)
- (19) Powers as to public utilities; pollution of water: purchase and condemnation. (Code, § 3031.)
- (20) Powers as to permits for buildings and where erected; parks, playgrounds, boulevards, etc. (Code, § 3032.)
- (21) Powers as to weights and measures, transportation, protection of property, etc.; fire department. (Code, § 3033.)
- (22) To use waters of Lake Drummond. (Code, § 3040.)
- (23) To lay an additional levy for sinking fund to pay bonded indebtedness, (Acts 1922.)

§ 14. Local assessment upon abutting landowners for sidewalks, alleys, and sewers.—Assessments for street improvements can no longer be made (Va. Const., § 170). The statute for local assessments for sidewalks, alleys, and sewers, is as follows: (1) *Local assessments; purposes; measure of damages; notice.*—By section 3067 of the Code: “No city or town shall impose any tax or assessment upon abutting landowners for street or other public local improvements, except for making and improving the walkways upon then existing streets, and improving and paving then existing alleys, and for either the construction, or for the use of sewers; and the same, when imposed shall not be in excess of the peculiar benefits resulting therefrom to such abutting landowners. But such improvements may be ordered by the council, and the cost thereof apportioned in pursuance of an agreement between the city or town and the abutting landowners, and, in the absence of such an agreement, improvements, the cost of which is to be defrayed in whole or in part by such local tax or assessment, may be ordered on a petition from not less than three-fourths of the landowners to be affected thereby, or by a two-thirds vote of all the members elected to the council, but notice shall first be given as hereinafter provided to the abutting landowners, notifying them when and where they may appear before the council or some committee thereof, or the administrative board or other similar board of the city or town, to whom the matter may be referred, to be heard in favor of or against such improvements. When the council consists of two branches, any committee acting under this or the three succeeding sections shall be composed of not less than three members from the larger and two members from the smaller branch. The cost of such improvement, when the same shall have been ascertained, shall be assessed or apportioned by the council, or by some committee thereof, or by any officer or board authorized by the council to make such assessment or appointment between the city or town and the abutting landowners where less than the whole is assessed; provided, that except when it is otherwise agreed, that portion assessed against the abutting landowners shall not exceed one-third of the total cost; but in cities and towns having a population by the last preceding United States census of not exceeding twelve thousand, the amount assessed shall

not exceed three-fourths of the total cost of such improvement."

(2) *Assessment to be reported to collector of taxes; notice to be given the landowners of amount of assessment.*—By section 3068: "The amount assessed against each landowner, or for which he is liable by agreement, shall be reported as soon as practicable to the collector of taxes, who shall enter the same as provided for other taxes. When the assessment or apportionment is not fixed by agreement, notice thereof, and of the amount so assessed or apportioned, shall be given each of the then abutting owners, and he shall be cited thereby to appear before the council, committee, officer or board having the matter in charge, not less than ten days thereafter, at a time and place to be designated therein, to show cause, if any he can, against such assessment or apportionment."

(3) *How notice to landowner given; objections.*—By section 3069: "The notice required by the preceding section may be given by personal service on all persons entitled to such notice, except that notice to an infant or insane person may be served on his guardian or committee, and notice to a non-resident may be mailed to him at his place of residence, or served on any agent of his having the property in charge, or on the tenant of the freehold, or, in any case where the owner is a non-resident, or where the owner's residence is not known, such notice may be given by publication in some newspaper published or having general circulation in the city or town once a week for four successive weeks. Or, in any case, in lieu of such personal service on the parties or their agents and of such publication, the notice to all parties may be given by publishing the same in some newspaper published or having general circulation in the city or town, once a week for two successive weeks, the last publication to be made at least ten days before the parties are cited to appear. Any landowner wishing to make objections to an assessment or apportionment may appear in person or by counsel, and state his objections."

(4) *Appeal to court; what clerk shall do.*—By section 3070: "If his objections are overruled, he shall, within thirty days thereafter, but not afterwards, have an appeal as of right to the corporation or hustings court of the city, or, in case of a town, to the circuit court of the county in which such

town is situated. When an appeal is taken, the clerk of the council, committee, or board, or the officer having the matter in charge, shall immediately deliver to the clerk of the court which has cognizance of the appeal the original notice relating to said assessment, with the judgment of the council, committee, officer or board, endorsed thereon, and the clerk shall docket the same."

(5) *How such appeal tried; lien of judgment; when to take effect; how enforced.*—By section 3071: "Such appeal shall be tried by the court or the judge thereof, in a summary way, without pleadings in writing and without a jury, in term time or in vacation, after ten days' notice to the adverse party, and the hearing shall be de novo. The amount finally assessed against or apportioned to each to each landowner, or taxed by agreement with him, as hereinbefore provided, shall be a lien on his abutting land, from the time when the work of improvement shall have been completed; subject, however, to his right of appeal and objection as aforesaid, and may be enforced by suit in equity; and provided, that as against a purchaser for value and without notice, such assessment or tax shall not be a lien except and until an abstract of such resolution or ordinance is recorded in the judgment docket of the clerk's office, in which deeds conveying real estate in such city or town are required by law to be recorded, showing the ownership and location of the property to be affected by the proposed improvements, and the same indexed in the name of the city or town and of the owner of the property."

§ 15. Licenses.—A city or town council may require a license and impose a license tax (even greater than the State tax) on any business therein for which a State license is required, and also for keeping for hire a wheeled carriage; and may, if they see fit, require bond with sureties, or make other regulations in reference thereto. (Code, § 3072.) Of course, if their charter gives them power to tax other business, the charter controls. Thus, Radford City has power, under its charter, to tax the sale of cider, and any other business not exempt by law. Newspapers are exempt from license tax (Code, § 3062); unless the charter gives authority to require a license.

§16. Farmers may sell farm products in city or town (outside market or sheds) without license or tax.—A city or town cannot tax, fine, or imprison a person for selling farm and domestic products therein, outside of the regular houses and sheds, if the products are grown and produced by him. Code, §§ 3076-7.

This section does not prevent taxing the business of selling cider by a person who is agent of another, who makes the cider from apples grown on the latter's farm. Also, a person selling milk may be required to pay an inspection fee. Where the charter provides for a curb or other tax, it may be imposed. A curb tax is allowed in Roanoke city. (See 112 Va. 547; 101 Va. 473; 114 Va. 766.)

§ 17. City and town levies.—The council annually has a statement made of the expenses of the coming year and makes a levy therefor on male adults and property, and other subjects assessed with State taxes, in addition. (Code, § 3073.) Assessments of property must be the same as for State taxation; and the penalty for non-payment is the same. (Va. Const., § 128; Code, §§ 3025, 3066.) Collector may distrain for such levies. (Code, § 3075.) For the law as to delinquent lists, how examined and allowed, and sent to Auditor, see Code, §§ 3076-7.)

§ 18. Disbursement of moneys; claims allowed to be posted and published.—Moneys received are applied as the council directs, and the council or clerk of circuit or corporation court are required to have made out a quarterly itemized statement of all claims allowed by council or judges, and have the same posted and published. (Code, § 3078.)

§ 19. As to fires in cities and towns.—See Code, §§ 3121-45.

§ 20. Effect of statutes on charters of cities and towns.—The new constitution amends all existing charters to conform thereto. (Va. Const., § 117.) See, also, section 51, below.

§ 21. How charter amended.—The Constitution provides that the legislature shall pass general laws for the organization and government of cities and towns, and that if a special act is desired, it must be referred to and approved by a joint committee of 12 members on special, private, and local legislation, and then passed in the usual way by a recorded

vote of two-thirds of the members elected to each house. (Va. Const., § 117.)

§ 22. Changes in form of government.—See Code, §§ 2925-55, and Acts 1922, p.—, amending §§ 2930-3, 2942, 2945, and Acts 1920, p. 554, amending §§ 2943-4.

II. STATUTES AS TO TOWNS

§ 23. Town Sergeants.—See Code, § 3026.

§ 24. How town election conducted.—See Code, §§ 2995-3000.

§ 25. When and how town officers qualify.—See Code, §§ 2696-7. They enter upon the duties of their office on the first day of September following. (Code, § 3001.)

§ 26. Election of mayor and councilmen of towns; other town officers.—Election is held every two years on the second Tuesday in June. The mayor and councilmen constitute the town council. (Code, § 2994.) Other town officers, unless otherwise provided for, are elected by the people. (Code, §§ 3009-10.)

§ 27. Oath of town councilmen; oaths of Mayor.—See Code, § 3002.

§ 28. Town council to judge election returns; may punish or expel members; order new election; how vacancies filled.—See Code, § 3003.

§ 29. Charter granted, amended, or annulled by court.—The circuit court or judge in vacation may, upon application of 20 voters, charter an unincorporated town or thickly settled community. (Code, §§ 2881-5, and Acts 1918, p. 560, amending § 2884, and Acts 1922, amending § 2881.) And a charter granted by the legislature may likewise be amended or annulled by the court upon application of a majority of the citizens (Acts 1920, p. 588).

And where a charter is granted by a court, the court may, upon petition of one-fourth of the voters, order an election for the annulment of the charter, (Acts 1922.)

§ 30. Council may suspend or remove other town officers.—See Code, § 3004.

§ 31. Mayor of town has powers and authority of a justice; appeal from his decision.—See *Justices in Cities and Towns*, section 2.

§ 32. How town council convened.—Upon the call in writing of three members. (Code, § 3029.)

§ 33. Proceedings of town councils; Mayor to preside; salary of mayor.—See Code, § 3028.

§ 34. Bond Issue.—See Code, §§ 3079-81, and Acts 1918, p. 536.

§ 35. Borrowing money and issuing bonds for public improvements.—See Code, §§ 3082-91, and Acts 1920, p. 617, amending § 3082 and Acts 1918, p. 536.

III. STATUTES AS TO CITIES

§ 36. Enumeration of population and formation of city.—For enumeration of the population of towns with a view of becoming cities, see Code, §§ 2973-5. For organization and government of second-class cities, see Code, §§ 2886-2909. For transition from second to first class cities, see Code, §§ 2910-24.

§ 37. Change of wards.—See Code, § 2978, and section 39, below.

§ 38. Council, how composed; terms of service.—See Va. Const., § 121; Code, § 2979, and Acts 1918, pp. 19, 164, 225.

§ 39. Council to re-apportion representation among wards; when to change wards.—See Code, § 2980. A mandamus lies to compel council to do this. (Code, § 2981.)

§ 40. Council to fill vacancies.—See Code, § 2983.

§ 41. Presiding officers of city councils; their duties.—See Code, § 2984.

§ 42. Term duties, pay, and liabilities of clerks of city courts and city attorney.—See Va. Const., §§ 118-19; Code, §§ 2989-90, 3007-8. For deputy clerks, see Code, § 2701.

§ 43. Powers and duties of police force.—See Code, § 2991.

§ 44. Duties, pay, and liabilities of city sergeant.—See Code, § 2992. For allowances to sergeant by city court for attending it, see Code, § 2993.

§ 45. Election of Mayor, council, and other city officers; deputies.—The mayor and council are elected on the second Tuesday in June, and they go into office on September 1st, following. All other elective officers are elected on Tuesday

after first Monday in November, and they go into office January 1st, following, except clerks of courts go into office along with the judges. (Va. Const., §§ 120-122; Code, § 3012.) If election or appointment of officers not otherwise provided for, the council elects or appoints them. (Code, § 2987.) By a recent amendment to the constitution, a city commissioner of the revenue and city treasurer may now succeed himself in office. For when and how they qualify, see Code, §§ 2696-7. For bonds of city clerks and treasurers, see Code, §§ 2698-9, and Acts 1918, p. 334 (as to Norfolk). For deputies of city clerks, sergeants and treasurer, see Code, § 2701.

§ 46. Veto Power of Mayor of city; how ordinance passed over veto.—See Va. Const., § 123; Code, § 3013.

§ 47. City Justices and their jurisdiction.—
in Cities and Towns.

§ 48. Preservation of order at races, fairs, baseball and football games, etc., in cities.— See Code, § 3005.

§ 49. How chain gangs in county established.—See Code, § 3061, (as to chain gang), and acts 1922, p.— (as to city farm).

§ 50. Matrons for jails in cities of 40,000 or more.—See Code, § 3027.

§ 51. Public defender in cities of 100,000 to 160,000.—See Acts 1920, p. 544. Title of acts says population of "50,000 or more."

IV. MUNICIPAL LAW GENERALLY

[For the following, we are greatly indebted to Prof. W. M. Lile's "Notes on Municipal Corporation," prepared for the use of students in the law school of the University of Virginia.]

§ 52. Creation and government of cities and towns.—Towns of 200 to 5,000 population, may be chartered by the circuit court, upon application of 20 voters, or by a special act passed in a special manner by a recorded two-thirds vote of the members elected to each house. See sections 21, 29, above.

If a town is large enough to become a city (i. e., has 5,000 inhabitants or more), an enumeration is had for that purpose, and the town accordingly organized into a city of the second

class; and such city may by another procedure become a city of the first class. See section 36, above.

By a recent amendment to the constitution, the legislature may, by general or special act, provide for a "commission" or other form of government for cities and towns. (Const., § 117.) For statutes passed in pursuance thereof, see division I., section 22, above.

The new constitution, by its own force, without legislation, amends all city and town charters to conform with the constitution. (Const., § 117.) The legislature may amend such charters by general law, or by special act, specially passed, as above mentioned. The general laws for the organization and government of cities and towns are given in divisions I., II., and III., above; but there are special provisions as to particular subjects. See division I., section 20, above. The legislature may also, by such special act, repeal a city or town charter. (Va. Const., § 117.)

§ 53. General powers of cities and towns.—A city or town can do nothing not expressly authorized by their charter or an act of the legislature or by the constitution, or not necessarily or fairly implied from the same, or incident thereto as essential to the declared objects and purposes of the municipality; and as to implied or incidental powers, in case of doubt, the power is denied. So a city or town can do no act, make no contract, nor incur any liability, that is not thus authorized. The legislature, on the other hand, may do anything not forbidden by the State or Federal constitutions.

If a city or town exceeds or threatens to exceed, its lawful authority, tax payers injured thereby may stop it by injunction, as, in the case of an unauthorized appropriation of its funds, a wrongful disposition of its property, unlawfully issuing its bonds, or levying illegal taxes. (Lile's Notes.)

§ 54. How streets, alleys, parks, and other public property acquired.—Property needed for streets and other public purposes may be acquired by condemnation, dedication, purchase or gift, or adverse possession.

Where property is condemned for its uses, the title, not the mere easement of use, vests absolutely in the city or town. (Code, §§ 4369, 4385.)

In case of dedication, where owners of lands desire to lay off towns, or additions to towns and cities, they may re-

cord a plat thereof and dedicate land for streets, alleys, parks, etc., and also for charitable, religious and educational purposes. In this case, only the easement, and not the title, passes, as to the streets, alleys, parks, etc., but in the case of property for charitable, religious, or educational purposes, the title does pass. (Code, §§ 5217-22.)

Dedication may also be made without any deed or writing. All that is required is the assent of the owner to the public use, and acceptance, express, or implied, by the public; and no specific length of enjoyment of the use is necessary on the part of the public. Such a dedication, in the absence of a contrary intent, passes only the easement of use, and not the title. An intent to dedicate is essential, but this will be inferred from acquiescence on the part of the owner after acceptance and long use by the public. When the intention and acceptance are once established, no length of use is essential; nor will a subsequent adverse use defeat the dedication. Where the intention is to be proved by long use only, there must be an adverse use by the public for the period of limitation prescribed in section 5805 of Code. As to acceptance, there need be no record evidence of it, as is required in the case of public roads; but the offer to dedicate must have been so acted on, either by the authorities of the city or town or by the general public, as to operate as an estoppel, and render it unjust to permit a denial of the dedication. (Lile's Notes.)

§ 55. Abandoning streets.—Where the charter gives authority, a street may be abandoned, but the authorities must act in good faith, and not arbitrarily or capriciously, and compensate the owner of the land and abutting lot-owners whatever they may be damaged. (Lile's Notes.)

§ 56. Rights of abutting owner in street.—(1) *In general.*—The owner of the land is entitled to damages for any other use of the street than the use by the public. Such additional use cannot be had without compensation. (Code, § 3882, etc., 4035, etc.) Thus, the planting of telegraph or telephone poles is an additional use for which the owner is entitled to compensation.

Unless it clearly appears to the contrary, where an owner divides land into lots and streets, and dedicates the streets expressly or by implication to the public, and sells the lots to

others, describing them as running to and with streets, the purchaser takes to the middle of the street, subject, of course, to its use for street purposes. See *Boundaries*. But where a city conveys property, in the absence of evidence of a contrary intention, it is presumed that the city meant to retain the title to the land of the street. (Lile's Notes.)

(2) *As to surface street car lines.*—These, being improved methods of travel by the public, do not constitute an additional use; but under the new constitution (Va. Const., § 58), the owner is entitled to compensation, if he be "damaged in his property" by such use. (Code, § 3882-3.) An abutting owner is not entitled to damages merely because his property is made less desirable and comfortable as a residence, because the track is laid on the side of the street instead of the centre, or runs so near the curbing next to his property that a vehicle cannot stand between the track and the curbing while a car is passing. He has a right to pass and repass, and also to free access to his property, but he has no right to stand vehicles on the street an unreasonable length of time, where it would impede travel over the street by those who have the right to use it. (108 Va., 594.)

Where the street car lines extend into the country and operate over country highways, sometimes connecting one city or town with another, especially where such lines carry freight as well as passengers, such use is an additional burden upon the land, for which abutting land owners are entitled to compensation. (Lile's Notes.)

(3) *As to steam railways.*—The operation of these in public streets is an additional burden upon the land, for which abutting owners are entitled to damages, whether they own the land in the street or not. The noise, vibration, smoke, cinders, soot, and the increased danger to property from fire and to human life in the streets, are important elements of damage not considered when the street was dedicated or condemned. In such case, under the new constitution, the word "damaged" embraces and gives a remedy for every physical injury to property, whether by noise, smoke, gas, vibrations, or otherwise, and there need be no physical invasion of the owner's property, but the owner may recover if the construction and operation of the improvement would amount to a private nuisance, or is the cause of substantial damage.

Where the use and operation of the road will depreciate the market value of property by reason of the smoke, noise, dust, and cinders arising from the ordinary and unlawful operation of the road, the property is "damaged," and the owner is entitled to compensation. (Lile's Notes; 107 Va. 562; 105 Va. 22; 110 Va. 340.)

(4) *Rights of city or town as to soil, stone, trees, etc., in street.*—To improve any particular street or others under the same general plan of projected improvement, the earth may be dug up and removed; but material should not be taken from one street not needing its removal, merely for the purpose of improving another. Also, shade trees within the street lines, no matter by whom planted, may be removed; but where the removal or mutilation of trees in the street is merely for the private interests of a telegraph, telephone or electric light, or other public company, the abutting owner of the land in the street is entitled to damages. (Lile's Notes.)

(5) *As to projecting or overhead structures.*—Where an overhead way or structure is erected over or across a public street for private use, which interferes with an abutting owner's use of light and air from the street, the abutting owner may remove by injunction, or he may recover damages for the injury sustained. By a recent statute, a city may adopt ordinances, authorizing abutting owners or occupants, within such limitations as it may prescribe, to put up awnings, fire escapes, shutters, signs, cornices, gutters, downspouts, bay windows, and other appendages to buildings; but such may be revoked at the pleasure of a city or of the legislature, and the owners are not relieved by the statute (§ 3015) of any negligence on their part. (Lile's Notes.)

(6) *As to gas, water and sewer pipes, and electric lighting.*—These, when used to serve the general public, though owned by private companies, are not an additional use for which the owner is entitled to compensation; but it would be probably otherwise where poles are erected and wires strung for electric lights for private consumers only, and not to light the streets also.

A franchise to a public service company (except to a trunk line railway), is sold to the highest bidder, after advertisement; but not for a longer period than thirty years. See division I., section 10, above. (Lile's Notes.)

(7) *Abutter's rights and liabilities as to areas, vaults, cellars, etc., in and under street.*—(a) *Abutter's rights.*—Subject to the right of a city or town to lay water, gas and sewer pipes, etc., an abutting owner may construct underground vaults in a street, or openings in the sidewalk for area lights, and for access to cellars, subject to legislative and municipal control.

(b) *Abutter's liability.*—In reference to such encroachments on a street for private purposes, the law is stated by Prof. Lile as follows:

“If the mere existence of the things within the street lines constitutes it a nuisance per se—whether because of improper construction, or contrary to city ordinances or statutes, or because constructed without consent, expressed or implied of the public authorities (where by local law such consent is required),—then the abutter becomes an insurer of the safety of the traveling public over the place in question. The existence of such an opening in the street, properly constructed and safe-guarded, and properly maintained, is not a nuisance per se, unless its existence, in its actual condition, is contrary to positive and local enactment; hence the creator of such an excavation, which is properly constructed and violative of no positive and local enactment—having done a lawful thing in a lawful way—is not an insurer of the public against injury therefrom, but is responsible only for such injuries as result from his negligence in the use and maintenance of the same. The same principles seem applicable to injuries caused by the fall of things suspended above the sidewalk—such as signs, awnings, lamps, cornices, etc.”

As to whether the landlord or the tenant is liable for an injury received by a traveler from a defective covering on any such opening in the street, depends on whether the thing was in bad repair when leased, in which case the landlord is liable, or whether it got in bad repair afterwards, in which case, in the absence of the landlord's covenant to repair, the tenant is liable. (Lile's Notes.)

(8) *As to removal of snow and ice from sidewalks.*—In the absence of an ordinance or statute requiring it, the abutting lot owner is certainly not required to clear away snow or ice from the sidewalk in front of his premises; and such an ordinance or statute would doubtlessly be held unconstitutional

as placing an unequal burden on him in the nature of unequal taxation. (Va. Const., § 168; 4 Va. Law Register 540, 547.) Even if such an ordinance be held valid, an injury caused a traveler by the failure of the owner to remove the snow and ice makes the city or town, and not the owner, liable therefor. (Lile's Notes.)

(9) *Using streets or sidewalks for business purposes.*—The public is entitled to use of the entire width of the street, including sidewalks, except where necessities of business may justify a reasonable and temporary obstruction, as in the case of loading and unloading goods, placing building material, etc. (Lile's Notes.)

§ 57. Liability of city or town for damages in grading streets.—Under the new constitution (Va. Const., § 58), forbidding "damage" of private property for public use, a city or town is liable to an abutting owner for any damage done his property by changing the grade of a street or by other street or public improvements. The measure of damages is the difference between the fair market value of the property immediately before and after the construction of the improvement.

The cost of adjusting the property to the improvement, as, for example, the cost of laying a new sidewalk, or building a retaining wall, is a proper element to be considered in determining whether the property has been depreciated in value or not, but not to be considered and assessed separately, independent of the enhanced value by reason of improvement. Experts may give their opinion as to whether the property has been enhanced or depreciated in value by reason of the public improvement. (105 Va. 108, 113-14.)

As to surface water, a city or town has a right to construct ditches and drains to drain the surface water from its streets into a ditch or drain which is a natural water course, so long as reasonable care and skill is exercised in doing the work. If it is practicable to provide for the escape of the surface water by means of ditches or drains through or under the street, then it is the duty of the city to provide such drains, and if it does not and damage results, it is liable. If a city or town fills up a street in such way that water, which before had been carried off by gutters, is thrown back on an adjoining lot, it is liable, if by proper care and means it might

have been prevented. In any case, a city or town is liable, if it fails to do the work of street improvement in a proper and skilful manner. (33 G. 208; 95 Va. 73; 101 Va. 432.)

For mode of procedure by the municipal authorities in ascertaining damage done to property owners in grading any street, alley, or other public place, notice, objections by property owners to assessments, appeal, etc., see division I., section 14, above. (Lile's Notes.)

§ 58. Liability of city or town for condition of streets, sidewalks, etc.—Cities and towns are required to exercise reasonable care to keep their streets, sidewalks, bridges, etc., in a reasonably safe condition for use in the usual mode by travelers, and are liable in damages for special injuries resulting from a neglect of such duty. If new territory is added, a reasonable time must be allowed, before liability for negligence attaches, to put its streets in proper condition for safe travel.

The plaintiff must show that the city or town had notice of the defect, except where the same was caused by its direct act or authority. The notice may be actual, or facts from which notice may be implied, or from which the defect ought to have been known and remedied, for it should inspect in order to discover such defects.

Of course the plaintiff's contributory negligence will defeat his recovery.

Where the city has contracted work, the city is still liable where the injury necessarily results therefrom; but where it is caused by something else, as, where the contractor's laborers leave carts, wheel-barrows, tools, etc., in the street at night, without the consent or knowledge of the city or town authorities, and without lights to warn travelers, the contractor is liable, as a stranger would be for similar obstructions, and the city is not liable unless it has notice thereof, or has negligently failed to discover the situation; but the city or town may recover from the wrongdoer the amount recovered from it. So as to injuries to travelers from defects in gradings or coverings or by leaving open cellar doors or coal-holes in the sidewalks, the city or town is liable only where it has notice thereof, or the circumstances are such that it is negligence not to have discovered it.

A city or town is not liable for permitting or even author-

izing a dangerous temporary use of the streets, from which injuries result, as, in the case of the explosion of fireworks, coasting in the streets, bicycling on sidewalks, and the like; but where it authorizes or permits a booth for a street carnival or other nuisance for a long time, say six days or more, it is liable for injuries resulting therefrom. (Lile's Notes.)

§ 59. General liability of city or town for negligent injuries.—(1) *When not liable.*—A city or town is not liable (except as to streets—see section 58, above), for the failure to exercise, or the manner in which, in good faith, it exercises its governmental or discretionary powers of a public or legislative character; nor for the defaults of its officers and servants in the administration of its governmental functions: and this rule applies where the person injured is an employee of the city, as well as to others. So a city or town is not liable (except as to streets), for failure to pass or enforce ordinances to prevent the injury complained of, as, for not removing a nuisance which does not render the streets unsafe; permitting the erection of wooden buildings contrary to an ordinance, or the explosion of fireworks which set fire to houses or injure passengers; allowing cows to run at large, which injure persons or property; not suppressing mobs which destroy property, or injure persons; not prohibiting bicycling on the sidewalk, or coasting in the streets. Nor is it liable for injuries resulting from not repairing stairs in public school building; not providing sufficient water to put out fires; negligence of public hospital employees; wrongful arrest or assault and battery by a police officer; negligent driving by the city fire department, or bursting of fire hose, or burning caused by sparks from fire engines; defects in the plan (which must be reasonable), of any public improvement, as the result of error of judgment or discretion; the condition or management of the city jail; or by driver of public street sprinkler. Where an officer or employee of a city or town, under color of his officer, does an act which is wholly unauthorized under all circumstances, the city or town is not liable, as, where a mayor, without authority, contracts for the removal of dead animals, which cause a nuisance. But where the act is authorized, as, where an officer is invested with power to remove a nuisance, and the officer acts in an improper manner, or has a discretion to act or not, and

goes ahead and destroys something which is not a nuisance, the city or town is liable.

A city or town is not liable for injuries by its officers, though acting by direction of its council, if the council had no authority to direct the act—as, where a council, erects a dam, without authority, on private property (though the person building the dam would be liable); where damage results from the operation of a stone quarry, not authorized by the charter: where liquor is destroyed to prevent rioting under a void ordinance. Nor is a city or town, or its officers, or even a private individual, liable for injuring or destroying a house or other property, in case of imminent and urgent public necessity, as, in case of a fire; but, by statute (§§ 8133-5), a city or town is liable for property injured or destroyed under the direction of the city engineer, if the property would not have been destroyed by the fire anyway, and could have been saved with ordinary care and diligence (Lile's Notes.)

(2) *When liable.*—A city or town is liable where the duty is not governmental; as for the default of its officers and employees in connection with property or business, e. g., gas-works, water-works, market house, or public wharves, which it owns or operates for its own profit.

A city or town is also liable where, acting for a lawful purpose and one within its charter powers, it wrongfully takes and enjoys private property, which might have been lawfully purchased or condemned—as, where stone is taken from a private property to repair a bridge; where a fence alleged to be an encroachment on the street is wrongfully torn down; where a street is opened through private property, without lawfully acquiring the right; where private property is flooded by a sewer, negligently constructed or maintained; where paving material is purchased from one who had no title; where one's house is used as a pest-house without his consent, and the like. (Lile's Notes.)

§ 60. As to punitive damages against city or town.—Punitive damages, or damages by way of punishment, in addition to damages by way of compensation, are not allowed against a city or town, as they are in many cases against private corporations and individuals. (Lile's Notes.)

§ 61. Ordinances of city or town.—Ordinances must be

authorized by and conform to the terms of the law, and these must conform to the constitution. An ordinance adopted under a general grant of authority, must be reasonable; if not, or if it interfere with a common right, or be partial, or restrictive of trade, or otherwise oppressive upon the citizens, it is void. Of course, if the legislature has authorized it in its existing form and it is not unconstitutional, it is valid. (Lile's Notes.)

§ 62. Garnishment of cities and towns.—Cities and towns are subject to garnishment, as in the case of private corporations and individuals—even in cases not within the statutes (Code, §§ 6559-61). (Lile's Notes.)

§ 63. Execution or mechanic's lien against city or town.—An execution cannot be levied on city or town property, nor can a mechanic's lien be filed against it. The remedy is by a writ of mandamus to compel the council, or other taxing authority, to lay a tax to raise sufficient revenue to satisfy its debts. The creditor should first obtain a judgment, or at least have a bond, coupon, or warrant. (Lile's Notes.)

§ 64. City or town bonds.—These bonds, payable to bearer, containing words of negotiability, and otherwise, in the form of negotiable paper, are negotiable, though under seal. See *Negotiable Instruments*. But a purchaser takes such a bond, as he does other negotiable paper, subject to want of delivery, fraud in its procurement, alteration or forgery, want of power, statutory invalidity (i. e., where some statute declares it to be void), and statute of limitations.

The maximum amount of issue must not exceed eighteen per cent of the assessed valuation of the real estate, with certain exceptions. See statute, division I., section 11, above.

As to the power of cities and towns to issue bonds, and the position of a purchaser in respect thereto, Prof. Lile gives the following important "working rules" as the law of Virginia: (1) If compliance with prescribed conditions is not recited on the face of the bonds, purchasers must make due investigation to discover whether such conditions have been fulfilled or not—and they purchase at their peril; (2) although compliance with prescribed conditions is recited on the face of the bonds, yet, if by comparing such of the bonds as he has access to, with the constitution, statute authorizing the issue, and any public records referred to in either.

and with reference to which the bonds are issued, the purchaser is able to discover want of compliance with conditions, again he buys at his peril; (3) but if there be valid legislative authority for the issue, and the bonds are issued by the proper city or town authority, and contain a recital on their face that all prescribed conditions have been complied with, and want of compliance is not disclosed by comparing such of the bonds as he has access to with the constitution, the statute authorizing the issue, and any public record therein referred to—then a holder in due course acquires a good title, regardless of want of compliance with prescribed conditions. (Lile's Notes.)

§ 65. As to right to exempt from taxation.—A city or town, without express authority from the legislature, cannot exempt any property from taxation. The power to tax all, requires that all shall be taxed and none exempt. And, under the new constitution, the legislature can exempt only in the case of public property, property of religious bodies, certain educational institutions, charitable organizations, etc. (Va. Const., §§ 183, 64). See section 10, (2), above. But such property is not exempt from assessments for sidewalks, alleys and sewers.

§ 66. Local assessments for sidewalks, alleys, and sewers.—For a comprehensive statute, see division I., section 14, above. Such assessment cannot be made the personal debt of the lot-owner, but a charge or lien only on the lot itself. (Lile's Notes.)

CITIZENS

See *Aliens*

§ 1. Who are, etc.

§ 2. Naturalization

§ 1. Who are, etc.—For who are citizens, how citizenship relinquished or suspended, see sections 62 to 65 of the Code. But these sections relate entirely to citizenship and fealty and has no reference to residence or domicile, which varies according to the subject matter. See *Domicile*.

§ 2. **Naturalization.**—An alien or foreigner, who is a friend (not in a country at war with us), and who is a free white person or of African nativity or descent, may become a citizen by being naturalized. This is done by the person's making a preliminary declaration on oath before a State or Federal court, or its clerk, at least two years before his application for admission as a citizen, that it is his bona fide intention to become a citizen of the United States, and to renounce forever all allegiance to any foreign prince or country, and particularly by name the prince or country of which he is at the time a subject. This preliminary statement need not be made if he has resided in the United States three years before his attaining 21 years of age. But he must make the above preliminary declaration at the time of his admission; and must then further declare on oath and prove that for two years next preceding it has been his bona fide intention to become a citizen of the United States, and he must in all other respects comply with the naturalization laws of Congress. Three years after the preliminary declaration he may apply for admission. When a person is admitted as a citizen he must declare on oath that he will support the United States Constitution, and that he renounces all allegiance and fidelity to every foreign prince or country, and particularly his own prince and country by name. He must show by the record that he has made the preliminary declaration, and by other proof that he has resided in the United States at least five years, and within the State one year, and that during that time he has behaved as a man of good moral character, attached to the principles of the United States Constitution and well disposed to the good order and happiness of the country.

Minor children of naturalized parents, if dwelling in the United States are citizens; also the wife of a citizen native or naturalized, if capable of naturalization, is a citizen, if she reside sometime during their marriage in the United States; and the widow and children of one who has made the preliminary declaration, but who dies before admission as a citizen become citizens upon taking the oath prescribed by law. And a foreigner above 24 years of age, who has enlisted in the military service of the United States, and been honorably discharged, may be admitted to citizenship without the preliminary declaration, upon proof of one year's

residence and good moral character and without the specified qualification as to race. (1 Min. Inst. 159-62.)

CIVIL CASES (GENERAL PROVISIONS AS TO)

See Trials

For "General Provisions as to Civil Cases", see Code, §§ 6373-7.

CLERKS OF COURT

See Code, §§ 3378-3407, and Acts 1920, pp. 242, 313, 105, amending §§ 3388, 3393, 3393, respectively; and Acts 1918, p. 534 (requiring clerks to keep telephones in their offices); Acts 1918, p. 504 (as to the recordation of maps and plats); Acts 1918, p. 437 (requiring clerks to keep separate book known as the Federal Farm Loan Mortgage Book); Acts 1920, p. 121, (allowing females to qualify as deputy clerks); Acts 1920, p. 566 (validation, verification, etc., of recordation of deeds, etc.)

CODE OF VIRGINIA

See Statutes

§ 1. **When went in effect.**—It went into effect January 13, 1920, see Code, § 6567.

§ 2. **Publication and distribution.**—See Acts 1918, p. 211; and Code, § 356.

COLD STORAGE LAW

(Acts 1919, p. 87; Pocket Code, § 4722b; Pollard's Code Biennial 1920, p. 702.)

See Public Utilities

- § 1. Definition of terms
- § 2. Licenses to operate cold-storage warehouses
- § 3. Unsanitary warehouses prohibited
- § 4. Receipts and withdrawals of food; records, quarterly reports
- § 5. Inspections
- § 6. Containers; marking
- § 7. Storage period
- § 8. Signs to be displayed; what advertising unlawful
- § 9. Return to storage prohibited
- § 10. Unsound food prohibited
- § 11. Rules and regulations
- § 12. To what act not applicable
- § 13. Public warehouseman not to own or deal in stored food commodities
- § 14. Penalties
- § 15. Authority of Dairy and Food Commissioner to employ assistants; appropriations

§ 1. Definition of terms.—For the purpose of this act, “cold storage” shall mean the storage or keeping of articles of food at or below a temperature of forty-five degrees above zero Fahrenheit in a cold-storage warehouse; “cold-storage warehouse” shall mean any place artificially or mechanically cooled to or below a temperature of forty-five degrees above zero Fahrenheit, in which articles of food are placed or held for thirty days or more; “articles of food” shall mean fresh meat and fresh-meat products, except in process of manufacture, and all fresh fish, game, poultry, eggs, milk, butter, cheese and edible fats and oils and lards.

(a) Any individual, firm, corporation or association engaged in the business of maintaining and operating cold-storage warehouses in which articles of food as herein defined are stored for hire or compensation shall be called a public cold-storage warehouseman.

(b) Any individual, firm, corporation or association that maintains and operates, as an adjunct to their business, cold-storage warehouses for the storage of articles of food as here-

in defined exclusively owned or dealt in by them, shall be called a private cold-storage warehouseman.

(c) Any individual, firm, corporation or association that combines a public cold-storage warehouse business with the storage of commodities as herein defined, which directly or indirectly it owns, deals in, or otherwise has an interest in, shall be called a combined public and private cold-storage warehouseman. (Acts 1919, p. 87, § 1.)

§ 2. Licenses to operate cold-storage warehouses.—Any person, firm or corporation desiring to operate or to continue to operate a cold-storage warehouse as herein defined and classified shall make application in writing to the State Dairy and Food Commissioner for that purpose, stating the location of the plant or plants. On receipt of the application, the State Dairy and Food Commissioner shall cause an examination to be made into the sanitary condition of said plant or plants, and, if found by him to be in a sanitary condition, he shall cause a license to be issued authorizing the applicant to operate such cold-storage warehouse or warehouses for and during the period of one year. The license shall be issued upon the payment of the applicant of a license fee of \$25 to the State Dairy and Food Commissioner for each such warehouse, except that when the gross business of such warehouse does not exceed the sum of \$1,000 per annum, such license fee shall be \$5, and where the gross business exceeds \$1,000 and does not exceed \$2,000, such license fee shall be \$10. All licenses, however, issued under this act at any time between the date of the passage hereof and January 1, 1920, shall expire on the last-named date, and thereafter all licenses issued hereunder shall expire on the thirty-first day of December next succeeding their issuance. (Id., § 1, (d) instead of § 2.)

§ 3. Unsanitary warehouses prohibited.—In case any cold-storage warehouse, or any part thereof, covered by a license under the provisions of this act, shall at any time be deemed by the State Dairy and Food Commissioner to be in an unsanitary condition, it shall be his duty to notify the licensee of such condition, and, upon the failure of the licensee to put such cold-storage warehouse, or the specified part thereof, in a sanitary condition within a reasonable time to be designated by him, it shall be the duty of the State Dairy and

Food Commissioner to prohibit the use under his license of such cold-storage warehouse, or part thereof, as he deems to be in an unsanitary condition, until such time as it may be put in a sanitary condition. (Id., § 3.)

§ 4. Receipts and withdrawals of food; records; quarterly reports.—It shall be the duty of any person, firm or corporation licensed to operate a cold-storage warehouse to keep an accurate record of the receipts and the withdrawals of the articles of food, and the State Dairy and Food Commissioner and his assistants shall have free access to these records at any time. Every such person, firm or corporation shall, furthermore, submit a quarterly report to the Dairy and Food Commissioner setting forth in itemized particulars the quantity of articles of food products as herein defined held in each cold-storage warehouse owned or operated by the licensee. Such quarterly reports shall be filed on or before the fifteenth day of the month following the expiration of each quarter, and the reports so rendered shall show the conditions existing on the last day of the quarter reported, and a summary of such reports shall be prepared by the State Dairy and Food Commissioner and shall be open to public inspection at any and all times. (Id., § 4.)

§ 5. Inspections.—It shall be the duty of the State Dairy and Food Commissioner to inspect all cold-storage warehouses in the State, and to make such inspection of the entry of articles of food therein as he may deem necessary to secure the proper enforcement of this act. The State Dairy and Food Commissioner, his assistants and employees, when properly authorized by him, shall be permitted access to such cold-storage warehouses, and all parts thereof, at all reasonable times for the purpose of inspection and enforcement of the provisions of this act. The State Dairy and Food Commissioner may also appoint and designate such person, or persons, as he may deem qualified to make the inspection herein required. (Id., § 5.)

§ 6. Containers; marking.—No person, firm or corporation conducting a cold-storage warehouse, as defined in this act, shall place or store in any cold-storage warehouse in this State articles of food, as herein defined, unless the same shall be plainly and durably marked, stamped or tagged, either

upon the container in which they are packed or upon the article of food itself, with the words "cold storage," with the name and location of the cold-storage warehouse, and with the date when placed therein; and no person, firm or corporation shall remove or permit the removal of such articles of food from any cold-storage warehouse unless the same shall be plainly and durably marked, stamped or tagged, either on the container in which it is enclosed or upon the article of food itself, with the date when it is removed from such cold-storage warehouse. (Id., § 6.)

§ 7. Storage period.—No person, firm or corporation shall keep in any cold-storage warehouse any article of food, as herein defined, for a longer period than ten calendar months, except with the written consent of the State Dairy and Food Commissioner, as hereinafter provided; nor shall any cold-storage warehouse permit any articles of food to be kept in cold storage for a longer period than ten months, except for the purpose of temporary preservation. In the event that articles of food remain in storage for a period of ten months, the warehouseman shall forthwith notify the Dairy and Food Commissioner of such fact, giving the name and address of the owner and the quantity and kind of the articles of food in storage, and shall also, at the same time, mail a copy of the said notice to the owner to his last-known postoffice address. If any person, firm or corporation have any articles of food in any cold-storage warehouse, and the name and whereabouts of the owner thereof be unknown, then, upon the expiration of the ten-months' storage period prescribed by this act, the Dairy and Food Commissioner shall order such articles of food to be sold at public auction; and the proceeds therefrom, after deducting costs of sale and storage charges, shall be paid into the State treasury and there held subject to the order of said owner. The said commissioner shall upon application, extend the period of storage beyond ten months for any particular articles of food when, in his opinion, such extension will not be detrimental to the public interests, and provided the same are found, upon examination, to be in proper condition for further storage. The length of time for which further storage is allowed shall be specified in an order granting the permission. The length of

time that any articles of food may have been kept in cold-storage in some other warehouse either within or without this State, shall be computed in the period of ten months permitted. (Id., § 7.)

§ 8. Signs to be displayed; what advertising unlawful.—It shall be unlawful to sell, or to offer or expose for sale, articles of food as herein defined which have been held in any cold-storage warehouse for a period of thirty days or over without notifying persons purchasing or intending to purchase the same that they have been so kept, by the display of a placard conspicuously marked "cold-storage goods," on the bulk mass or articles of food, and it shall be unlawful to represent or advertise as fresh articles of food which have been held in any cold-storage warehouse for a period of thirty days or over. (Id., § 8.)

§ 9. Return to storage prohibited.—It shall be unlawful to return to any cold-storage warehouse any articles of food as herein defined which has once been released from such storage and placed on the market for sale to consumers, except for the purpose of temporary preservation; but nothing in this section shall be construed to prevent the transfer of goods from one cold-storage warehouse to another; provided, that all prior stamping, marking and tagging shall remain thereon, and that such transfer is not made for the purpose of evading any provision of this act. (Id., § 9.)

§ 10. Unsound food prohibited.—The licensee shall not receive or keep in any cold-storage warehouse any food products which are in any way diseased, tainted or unfit for human consumption. (Id., § 10.)

§ 11. Rules and regulations.—The State Dairy and Food Commissioner shall, with the approval of the State Board of Agriculture and Immigration, make all necessary rules and regulations to carry into effect the provisions of this act. (Id., § 11.)

§ 12. To what act not applicable.—The provision of this act shall not apply to ice boxes or refrigerators maintained by wholesale or retail dealers. (Id., § 12.)

§ 13. Public warehouseman not to own or deal in stored food commodities.—No person, firm or corporation, or any employee of same, engaged in the business of storing foods as

herein defined for the public in a public cold-storage warehouse, and charging for such services, shall either directly or indirectly own or deal in any food commodities, as herein above defined, stored in such warehouse, except food commodities that are legally acquired for charges or advances made. No person, firm or corporation licensed to operate a cold-storage warehouse shall make any loan on foods as herein defined stored in such warehouse, or incur liability by indorsement, guarantee or otherwise in connection with any loan on foods stored in such warehouse in excess of seventy per centum of the market value of such foods on the date of said loan. A margin of not less than thirty per centum on every loan shall be maintained at all times. Any advances made by the cold-storage warehouse on the goods upon which the loan is made, such as freight, cartage or insurance, shall be included in the seventy per centum of the market value permitted above. (Id., § 13.)

§ 14. Penalties.—After this act shall have been in force thirty days, any person, or any member or agent of any firm, or any officer, director or agent of any corporation violating any provision of the same shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$25 nor more than \$500 for the first offense. Upon a second or subsequent conviction, the offender shall be subject to a like fine, or, in addition, shall be confined in jail not less than thirty days nor more than one year, in the discretion of the tribunal trying the case. (Id., § 14.)

§ 15. Authority of Dairy and Food Commissioner to employ assistants; appropriations.—The Dairy and Food Commissioner is hereby authorized and required, with the approval of the Board of Agriculture and Immigration, to employ as many assistants, in addition to those already employed by them, as may be necessary effectually to enforce the provisions of this act, and the sum of \$5,000 or so much thereof as may be necessary, is hereby appropriated out of any funds in the treasury not otherwise appropriated, to be expended by the said commissioner in carrying out its said provisions, in addition to the other funds to the credit of the Dairy and Food Division. Furthermore, all license fees received under this act shall be paid into the treasury of the State to the

credit of the dairy and food division, and shall be used for the purpose of supplementing the appropriation aforesaid. The Dairy and Food Commissioner shall include in his annual report a detailed statement of all such receipts and disbursements. (Id., § 15.)

COLORED PERSON

A "colored person" is one having one-sixteenth or more of negro blood (Code, § 67).

COMMISSIONER IN CHANCERY

See Fees of Officers, etc.; Judicial Sale

For chapter as to appointment, number, removal of commissioners in chancery, reference of accounts to such a commissioner, the weight of his report, and proceedings before him, see Code, §§ 6178-88, and Acts 1918, pp. 94, 259, 338. (Special for the appointment of commissioners for the circuit courts of Norfolk city and Montgomery and Pittsylvania counties; § 6178 now gives general authority to the courts or judges for such purpose.) See, also, 4 Min. Inst., 1473 et seq. For article on "Reference to Commissioner in Chancery," see 5 Va. Law Reg. (N. S.), 497.

COMMISSIONER OF ACCOUNTS

See Administrators and Executors

For his appointment, bond, removal, duties, fees, etc., see Code, §§ 5401-5, 5408, 5412 (as amended by Acts 1920, pp. 341, 595), 5414-16, 5420-4, 5426-8; and 4 Min. Inst., 1476 and seq.

COMMISSION MERCHANT, OR FACTOR

See Agents and Agency; Brokers

§ 1. Definition; duty, authority, power, lien, etc.

§ 2. License

§ 1. **Definition; duty, authority, power, lien, etc.**—A commission merchant, or factor, is an agent who receives goods or merchandise from the owners to sell on commission. He differs from a broker in having possession of the goods, selling in his own name, and having broader powers. Where not otherwise instructed, a commission merchant may sell at the usual credit (but cannot extend credit without permission), make usual warranties, receive payment, and observe the other rules and usages of that particular market. He has no authority to barter or pledge his principal's goods for the payment of his own debts. Like other agents, he must obey the instructions of his principal, act with the utmost good faith toward him and use reasonable skill and diligence in the business entrusted to him. He is not required to insure goods, unless directed to do so. He is required to use ordinary care in keeping the goods, otherwise he is liable if they are damaged, lost, or destroyed. A commission merchant has a general lien on the goods which are not sold and on the price and securities as such as are, for his just charges and expenses. (See 5 Munf. 34; 1 Grat. 96; 20 Grat. 434.)

A shipper of farm products also has a lien on the estate of the commission merchant for farm products shipped to him, where the latter becomes insolvent or dies before payment, upon proof of his claim, subject only to such liens as were credited and recorded prior to said insolvency or death; provided the shipper has not, without requesting payment, allowed the money from such sale to remain with the agent at interest, or to remain in his hands over 30 days after knowing of such sale. (Code, § 6448.)

His duties, authority, and power are in general the same as in the case of agents in general—see *Agents and Agency*.

§ 2. **License.**—Under the license law, a commission merchant is one buying or selling for another any kind of merchandise on commission except associations or organizations

of farmers, including produce exchanges, organized and maintained by farmers for mutual help in the marketing of their produce and not for profit; and when licensed he may sell any personal property which may be left with or consigned (or shipped) to him for sale, except those things for which a stock broker's license is required—see *Brokers*, section 7, (2). A license is required, under penalty of \$50 to \$1,000. The license tax is \$50, if commissions are not over \$1,000; but if over \$1,000, an additional tax of \$1.00 on each \$100, or fraction thereof, in excess of \$1,000. (Acts 1915, p. 232; 2 Code 1919, p. 3124, § 48, as amended by Acts 1922, and § 49.)

COMMON CARRIERS

(See 3 Min. Inst. 276-90.)

See *Baggage*; *Corporations*; and *State Corporation Commission*

I. IN GENERAL

- § 1. Definition
- § 2. Transportation companies as common carriers
 - (1) What "transportation company" includes
 - (2) What common carrier "transportation companies" include
- § 3. Discrimination prohibited
- § 4. Rates of transportation
- § 5. How free or reduced rates allowed
- § 6. Companies to obey trackage rules prescribed by commission
- § 7. Penalty on company for violation of law as to transportation companies
- § 8. Suit where common carrier is not incorporated
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II. COMMON CARRIER OF GODDS

- § 1. To receive and receipt for freight; penalty for failure
- § 2. To ship promptly; penalty for failure
- § 3. Company not to charge additional fees
- § 4. False billing, classification, weighing, or report, or false representation of contents; penalty
- § 5. Consignee to be notified of arrival of freight
- § 6. Farm produce to be transported promptly

- § 7. Transportation of explosives
- § 8. Damages for loss or injury for freight by negligence
 - (1) Liability
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- § 9. Rules as to car service, demurrage (detention or delay), and storage

CAR SERVICE RULES

- (1) Ordering cars by shippers; furnishing cars by railroads
- (2) (a) Time for transporting freight; penalties for delay
 - (b) Filing claims for delays
 - (c) Time for switching outgoing freight; penalty for delay
- (3) Notice to consignee of arrival; penalty for failure
- (4) Time for unloading freight at depots, or placing loaded cars on tracks; penalty for failure

DEMURRAGE RULES

- (5) Cars subject to rules
- (6) Free time allowed
- (7) Computing time
- (8) Notification
- (9) Placing cars for unloading
- (10) Cars for loading
- (11) Demurrage charged
- (12) Claims
 - (A) Weather interference
 - (B) Bunching
 - (1) Cars for loading
 - (2) Cars for unloading or reconsigning
 - (C) Demand or overcharge
 - (D) Delayed or improper notice by this railroad
 - (E) Error of any carrier which prevents proper tender or delivery
 - (F) Delay by U. S. Customs
- (13) Average agreement
- (14) Freight subject to rules
- (15) Notification
- (16) Free time allowed
- (17) Computing time
- (18) Charges for storage on freight other than explosives and other dangerous articles
- (19) Charges for storage on explosives and other dangerous articles
- (20) Claims and causes therefor
 - (A) Weather interference
 - (B) Demand of overcharge
 - (C) Delayed or improper notice by carrier
 - (D) Carrier's errors which prevent proper tender or delivery

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- § 10. As to stoppage or seizure of goods in transit
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III. COMMON CARRIER OF LIVE STOCK

- § 1. To receive and transport live stock; penalty for failure; injunction
- § 2. Liability of carriers of live stock
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IV. CARRIER OF PASSENGERS

- § 1. When ticket office and waiting room to be opened; announcement of stations; penalty
- § 2. Posting notice of delay of trains
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- § 5. Vestibule fronts for electric railways, when
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- § 7. Abandonment, repair and rebuilding railroad stations; waiting room and water closets
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- § 9. Conductors, motormen, and agents conservators of the peace; concealed weapons
- § 10. Baggage of passengers—see *Baggage*
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 - (1) Who are passengers
 - (2) Care required of carrier; for what negligence liable
 - (3) Contributory negligence of passenger
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 - (5) Injury to passenger by independent contractor
 - (6) Liability of carrier for death of passenger
 - (7) Carrier cannot contract against negligence

I. IN GENERAL

§ 1. **Definition.**—A common carrier is one who holds himself out to the public as ready to transport from place to place for hire all persons or the goods of all persons that may employ him; such as railroad, street railway, express, canal and steamboat companies, which are public service corporations; and wagons, teamsters, draymen, hackmen, cab-drivers, ferrymen, and other public means of transportation, incorporated or not,

§ 2. Transportation companies as common carriers.—In Virginia, transportation companies as common carriers are largely governed by the statutes as to “public service corporations,” especially the chapters on “transportation companies,” “railroad companies,” and “express companies.” (Code §§ 3881-4034.) And the constitution provides that the right of the Commonwealth, through such instrumentalities as it may select to regulate and control common carriers, shall not be surrendered or abridged. (Const., § 164.)

(1) *What “transportation company” includes.*—“A transportation company” includes a railroad, street railway, electric railway, express, or canal, steamboat, canal company, steamboat or steamship line; and also any freight car company, car association, car service association, or car trust, or any common carrier, over a route acquired in whole or part under the right of eminent domain, i. e., condemnation proceedings. (Va. Const., § 153; Code § 3881.)

A “railroad company” as a transportation company, includes a railroad or railway, whether operated by steam, electricity, or other motive power, except where otherwise specified. (Code, § 3881.)

(2) *What common carriers “transportation companies” include.*—“Common carrier” is a broader expression than “transportation company.” All transportation companies are common carriers; but all common carriers are not transportation companies. Only such common carriers as do business, “over a route acquired in whole or part under the right of eminent domain,”—i. e., the right to take private property for public use,—are included by “transportation company.” (Code, § 3881.) Other common carriers, as, hackmen, cabmen, draymen, ferrymen, wagoners, teamsters, etc., are not included by “transportation company,” and so are not controlled by the act, but by the common law of bailment. See *Bailment*.

§ 3. Discrimination prohibited.—It is unlawful for a transportation company to take, charge, or receive any greater compensation, in the aggregate, for the transportation of passengers of the same class or property along the same line and in the same direction for a shorter than for a longer distance, the shorter being included in the longer distance; which does

not authorize it to charge and receive as great compensation for the shorter as for the longer distance; but the State Corporation Commission may change this rule in special cases. And this commission operating in conjunction with the Interstate Commerce Commission endeavors to make the rule applicable to interstate shipments. (Va. Const., § 160; Code, § 3904.)

As to unjust discrimination between different persons, it is declared lawful for a transportation company, directly or indirectly, by any special rate, rebate, drawback, or other device, to discriminate in charges as between different persons or corporations for the like service under the same circumstances and conditions, but this is not to prevent an exchange of transportation for advertising in a newspaper, at regular rates. (Code, § 3905, as amended by Acts 1920, p. 234.)

Any undue preference or advantage to any particular person or locality or kind of traffic, or any undue or unreasonable prejudice or disadvantage in reference thereto, is unlawful. (Code, § 3906.)

Also, there shall be no discrimination as to interchange of traffic and passengers between different lines. Code, § 3907.)

Any one guilty of offering inducement or aiding therein, to a transportation company, its officers, or agents, for unjust discrimination, is punishable by a fine of \$100 to \$500. (Code, § 3914.)

§ 4. Rates of transportation.—All schedule of rates, fares, and charges, and all changes made in the same, must be submitted to the State Corporation Commission. (Code, § 3911.)

A schedule of rates are required to be printed and posted in every depot, station, or office, for public inspection. (Code, § 3908.)

No advance in rates are to be made until approved by the State Corporation Commission, and then only after 10 days' public notice. (Code, § 3909.)

After the rates have been authorized or prescribed by the Commission, it is unlawful to charge higher or lower rates. (Code, § 3910.)

Contracts between companies as to rates and division of

earnings, are to be submitted to the State Corporation Commission for their inspection and approval; and the reasonableness of any rate, charge, or classification of traffic fixed by the commission is not to be questioned in the ordinary courts of justice. The commission from time to time may fix, change, and revise the schedules of rates, etc. (Code, §§ 3919-20.)

Officers, agents, and employees are required to make reports to the State Corporation Commission, under a penalty for failure, of \$500. (Code, § 3924.)

§ 5. How free or reduced rates allowed.—The State Corporation Commission may authorize or prescribe free or reduced rates for the Federal, State, or town, or city government, or for charitable purposes and the company may provide free or reduced rates to or from fairs and expositions for exhibition at them, or the free carriage of homeless and destitute persons and the necessary agents employed in such transportation, and the company may give a free or reduced rate on mileage books, excursions, or commutation passenger tickets, or on round trip tickets to persons in charge of live stock. The company may give free or reduced rates to ministers, regular traveling Y. M. C. A. or Y. W. C. A. secretaries, indigent (poor) persons, or to inmates of Confederate homes and State homes for disabled soldiers and sailors, and they may give free carriage to their own officers, employees, and members of their families, or to any one else not prohibited by the constitution. And the principal officers of the company may exchange passes or tickets with other companies for other officers, employees, and members of their families. (Code, § 3918.)

§ 6. Companies to obey trackage rules prescribed by commission.—A violation is punishable by a fine of \$100 to \$500. (Code, § 3921.)

§ 7. Penalty on company for violation of law as to transportation companies.—Any violation, unless otherwise provided for, is punishable by the State Corporation Commission, by a fine not over \$500. (Code, § 3925.)

Failure of the company to report, when required by the State Corporation Commission, or hindering the commission in the discharge of its duties, is punishable by a fine of \$500. (Code, § 3924.)

Or failure to make repairs, improvements, or any change in the conduct of its business, the company may be fined by the commission \$100 to \$1,000. (Code, § 3932.)

§ 8. Suit where common carrier not incorporated.—

Where transportation lines are owned or operated by persons, partnerships, or associations, not incorporated, any one or more of them may be sued by his or their own name or names only, and such suit does not abate for want of joining any of his co-partners or co-proprietors. (Code, § 3931.)

In a case against a common carrier not incorporated, process or notice is served on the carrier, or his agent, or on the driver, captain, or conductor of his vehicle; or if none of them be in the county or corporation, the same is sufficiently served by the publication thereof once a week for four successive weeks, in a newspaper printed in the State. (Code, § 6067.)

For suit and service of process, where incorporated, see *Corporations*, sections 11 and 12.

§ 9. Equipment and accommodation.—For the purpose of transportation of persons and property, a railroad company must keep in good order such locomotives, cars, and other things as may be proper, and sufficient accommodation for the transportation of all passengers and property as may be, within a reasonable time previous to the departure of trains, offered for transportation, at places established for receiving and discharging passengers and freight. (Code, §§ 3937, 3990.)

No passenger trains must run without on airbrake, or some equally effective appliance for controlling the speed of trains, which may be applied by the engineer of each car, and which shall at all times be kept in good condition and ready for use at the discretion of the engineer. The State Corporation Commission may require all other trains to be equipped with like appliances. The commission may also require a railroad company to establish and maintain the "block system," or some other equally efficient system to regulate the movement of its trains, in order to prevent collision. (Code, § 3989.)

II. COMMON CARRIER OF GOODS

§ 1. To receive and receipt for freight; penalty for fail-

ure.—It is the duty of “each and every common carrier to receive and receipt for all freight delivered for transmission at any of their freight receiving depots, when delivered ready for shipment during the business hours established at such depots,” but this does not apply to live stock, lumber, perishable freight, or to such freight as requires special cars for shipment. For failure, hereunder, the penalty is a fine of \$10 to \$25 for every such refusal. (Code, § 3927.) This is a separate act—not a part of the “act concerning public service corporations.”

Duplicate freight receipts must be given, upon request. Upon presentation of the receipt, and payment of freight bill, the goods are delivered to consignee. A violation hereof is punishable by a forfeiture of \$100 to the party injured. (Code, § 3915.)

See Bill of Lading.

§ 2. To ship promptly; penalty for failure.—A railroad company upon the payment or tender of the lawful rates, must transport to and deliver at any depot or other regular stopping place indicated by the owner, such articles as are delivered or offered at any depot or other receiving place, in proper condition, to be transported. Property must, as far as practicable, be transported in the order of time in which it is delivered or offered, and the rates paid or tendered. If the company, after payment or tender of the rates, fail or refuse to receive or to transport, or to deliver in a reasonable time, any property so delivered and offered; or if the company demand or receive more than is lawful, it shall forfeit to the injured party, to be recovered by motion or action, \$25 to \$100. (Code, §§ 3937, 3939.) For law and penalty as to delays, see rule 1, of section 8, below.

The measure of damages in case of delay in the delivery of goods is the difference between the market value at the date of shipment and the market price at delivery. (See some Virginia digest.)

If the goods are not received by the consignee a reasonable time after arrival, the carrier is not liable as a common carrier, but only for ordinary negligence as a warehouseman. (See some Virginia digest.)

§ 3. Company not to charge additional fees.—The company must not charge any fee or commission in addition to

regular charges, under a penalty of \$100 fine; but a transportation company may charge such fees and commissions, on shipments to points between regular depots, as may be agreed upon between the shipper and the company. (Code, § 3939.)

§ 4. False billing, classification, weighing, or report, or false representation of contents; penalty.—Any one guilty in this respect, whether company or agent, or consignor or consignee or their agent, is punishable by a fine of \$100 to \$500. (Code, §§ 3912-13.)

§ 5. Consignee to be notified of arrival of freight.—This may be done by mail or otherwise, and a reasonable time is given for the removal of the same, making due allowance for its class and for bad weather and holidays. (Code, § 3916.)

§ 6. Farm produce to be transported promptly.—Railroad companies must, upon 3 days' notice, provide transportation for all farm produce delivered at their depot, or must have at the depot safe storage for same. They are responsible for damages resulting from failure to provide for transportation or storage. (Code, § 3956.)

§ 7. Transportation of explosives.—Explosives cannot be transported along with passengers, in quantities exceeding the maximum amount fixed by the State Corporation Commission and they must be plainly and legibly marked with the names of such compounds and the words "explosives," "dangerous." Any violation hereof is punishable by a fine of \$50 to \$500. (Code, §§ 2922-3.) For complete detail informations as to the transportation of explosives, see regulations of the commission. Write the Commissioner at Richmond, Va.

§ 8. Damages for loss or injury to freight by negligence.—

(1) *Liability.*—A common carrier, or a railroad or other transportation company, receiving freight for shipment within this State, or issuing a bill of lading therefor, thereby contracts for carriage to destination even beyond its line or route, and is liable for any loss or damage thereto, caused by its negligence or the negligence of any connecting line, and the fact of loss or damage is prima facie evidence of negligence; but the line receiving the freight may recover of the connecting line, if the loss or damage was on the line of the latter. If the receiving line does not pay within a reasonable

time, the shipper, his agent, or assignee may sue for the amount of such loss or damage. No contract, receipt, rule, or regulation can exempt from or limit such liability. As to shipments on different lines in the State (but not out), if there is a contract fixing the liability on the line where the negligence occurred, it is binding; but even then the first line is liable, unless within a reasonable time after demand made, it does not give satisfactory proof to the shipper that the loss or damage did not occur while in its line. (Code, § 3926.) If the loss or damage occurs on a water line or route in the connecting line from some cause which exempts a water carrier from liability, the first line is not liable. (109 Va. 288.) Congress has passed a similar act—11 Va. L. R. 509.

The first or initial carrier is bound for the safe carriage of goods to their destination, unless the loss or damage occur on a water line or route in the connecting line from some cause which exempts a water carrier from liability; but the carrier may by written contract be released from liability, though even in this case it shall be liable, unless within a reasonable time after demand made it give satisfactory proof to the consignor that the loss or injury did not occur while the goods were in its charge. (Code, § 3929.)

But no agreement for exemption from loss or injury from negligence is valid. (Code, § 3930.)

(2) *When and how claims to be paid.*—A claim against a common carrier for loss or damage to property while in his or its possession, or for storage, demurrage, and car service, must be adjusted and paid within 60 days, in case of shipments wholly within this State, or claims for demurrage or car service, and within 90 days, in case of shipments from without this State, after the filing of such claim with the agent of the carrier at the point of destination or with the claim department of the carrier. No claim must be filed until after the arrival of the shipment or of some part thereof, or until after a reasonable time for the arrival thereof. The carrier is liable for the amount of loss or damage to freight, or the penalty as to storage, demurrage, and car service, with interest from the filing of the claim. Failure to adjust and pay such claim within the time mentioned subjects the carrier to a penalty of \$25, to be recovered by the claimant in the same action or proceeding in the court or before a justice

having jurisdiction; but if the claimant does not recover the full amount claimed, no penalty shall be recovered, and, if the claim be found to be fraudulent, the claimant shall pay the carrier \$25 to be recovered along with the costs. If, after the time mentioned, the carrier voluntarily pays the full amount claimed, the claimant may recover the penalty alone. Either party may before or at the return day of a warrant hereunder before a justice file an affidavit relating to subject matter, and the other party thereupon has a right to a continuance for a reasonable time, and proceed after reasonable notice, to take the depositions of the person making the affidavit which affidavit and deposition may also be used on appeal. (Code, § 3928, as amended by Acts 1918, p. 467.)

A known stipulation in the bill of lading that the carrier shall not be liable unless the claim is filed within 30 days, is valid and binding on the shipper.

So a common carrier is liable for the loss of or injury to goods it receives for transportation, the carrier being considered an insurer of the goods against all such loss or injury; but this rule is subject to the following exceptions: Where the loss or injury is due to the "act of God" or public enemy, the inherent nature or quality of the goods, or the act or fault of the owner or shipper. The carrier is liable for loss by fire, water, collision, or other accidental cause, or by negligence or wrong of the carrier's servants or of third persons. The carrier is not liable, where the loss or injury is caused by lightning, a great and unexpected flood, snow storm, tornado, earthquake, or other act of God, see *accident or act of God*. A carrier is also liable when a loss or injury is due to the acts of violence of mobs, rioters, strikers, they not being a "public enemy."

A common carrier is not liable where the loss or injury is due to the wrongful or negligent act of the shipper, as, the concealment of the nature or the value of the goods, improper or defective packing not apparent to the carrier, misdirection, or negligence in loading or unloading. Neither is a carrier liable when the loss or injury is due to the inherent nature, quality, or defects of the goods; in other words, where the loss occurs from the operation of natural causes, if the carrier's negligence did occasion or contribute to the loss or injury; as, decaying of fruit, fermentation of molasses,

etc., freezing of vegetables, fruit, fruit trees, etc., and injuries by warm weather. In case of injuries to live stock, see subdivision IV. below.

Where a carrier relies on one of these exceptions, the burden is on him to prove such exception and to show that such act was the immediate cause of the loss or injury. (See Numerous Va. decisions.)

A railroad, steamship, or steamboat company is not liable as a carrier of express. (Code, § 4031.)

§ 9. Rules as to car service, demurrage (detention or delay), and storage.—The following rules and regulations relating to "Storage, Demurrage, and Car Service in Virginia," were prescribed by the State Corporation Commission pursuant to constitutional and legislative authority, and went into effect August 21, 1921. (Va. Cons., § 156; Code, § 3774.) These rules have been held not unconstitutional, as incidentally affecting interstate commerce (102 Va. 599); but the provision of Rule I., of the "Car Service Rules" (see (1), below), which imposes a penalty for failure to furnish empty cars to shippers within four days after application therefor, is held unconstitutional as to interstate shipments, because it imposes an unreasonable burden on interstate commerce (107 Va. 771). They are expressly made applicable to carriers and shippers doing business in Virginia. These rules in full may be had on application to the commission in Richmond.

It is provided in the "preamble" or introduction to said rules, that "all demurrage, storage, and car service charges, and all car detention charges, shall be prescribed in these rules. Nothing in these rules shall apply to shipments of live stock and perishable freight (except as hereinafter specified), which shipments shall be governed by the statutes now in force, with such additional requirements as may be ordered by the commission from time to time. In all computation of time under these rules, Sundays and legal holidays are to be excluded, except as otherwise provided," and "each rule must be treated as separate and distinct, and the charges and penalties should be arrived at accordingly."

And in its "conclusion," the commission reserves the right on its own motion to suspend the operation of these rules, or any one or more of them, in whole or in part, whenever it shall appear that justice demands such action, and the com-

mission will, upon complaint, hear and act upon applications for a like suspension. The commission further reserves all of its powers under the Constitution and laws of the State to impose fines and penalties upon transportation companies persistently disregarding these rules or failing to furnish reasonable transportation facilities."

By statute it is provided that a claim against a common carrier for storage, demurrage, and car service charges, under the rules and regulations prescribed by the State Corporation Commission, must be adjusted and paid within 60 days, after the filing of such claim with the agent of the carrier at the point of destination or with the claims department of the carrier. The carrier is liable for such claim, together with interest from filing of the claim. Failure to adjust and pay such claim within 60 days, subjects the carrier to a penalty of \$25, to be recovered by the claimant in the same action or proceeding in the court or before a justice having jurisdiction; but if the claimant does not recover the full amount claimed no penalty shall be recovered, and, if the claim be found to be fraudulent, the claimant shall pay the carrier \$25, to be recovered along with the costs. If, after the time mentioned, the carrier voluntarily pays the full amount claimed, the claimant can recover the penalty alone. And affidavit or depositions may be used before the justice as provided in case of a warrant for loss or damage—see section 8, (2), above. (Code, § 3928, as amended by Acts 1918, p 46.)

It should also be observed that another statute provides that if a consignor or consignee claims and receives the penalties imposed upon railroad companies in the foregoing rules for failure to comply therewith, such penalties or charges shall, "when paid, be in full of any and all claims for damages growing out of such failure; provided, however, that the owner of the freight may, at his election, waive said charges and elect to claim such actual damage as he may have sustained, instead of such charges." Code § 3774.)

CAR SERVICE RULES

(1) *Ordering cars by shippers; furnishing cars by railroads*—The shipper makes written application to the agent for a car or cars, stating the station or siding at which to be placed, the character of freight and its final destination, and

the company is required to furnish same within four days from 7 a. m. next morning. Or if the shipper specifies a future day for shipment and gives at least four days notice thereof from 7 a. m. next day, the company must furnish a car or cars on the day specified. The agent must keep a consecutive daily record of all such applications, which shall be opened to public inspection during business hours.

For failure to comply with this rule, the company forfeits to the shipper, or his assignee, in writing having a substantial interest, \$2 per car per day or fraction thereof for the first four days and \$5 per day thereafter for delay after expiration of free time (see (6) below), upon demand in writing made within 30 days from the time the car is furnished; if not furnished within 30 days after the free time, the claim may be filed within 60 days from the application date, and having so done the claimant may recover \$2 per car per day for first four days; \$5 per car per day thereafter, counting after the free time.

Grain doors must be supplied by the company, or the shipper may provide lumber therefor at the company's expense, charging for not over six side door openings at 50 cents each.

This rule does not apply to shipments of coal and coke from mines and ovens, nor to delays from causes beyond the carrier's power to prevent, such as Interstate Commerce orders, but such delays are counted as free time. A carrier's failure to provide reasonable and necessary rolling stock is not a cause of delay beyond the carrier's power to prevent. (Rule I. "Car Service Section," p. 23.)

By statute it is provided, that when any car or cars are delivered by one railroad company to another to be hauled to any freight station on the line of the latter, or when any such company receive an order for cars to be furnished at any point on its line, such receiving company must afford all reasonably proper and equal facilities for forwarding such car or cars along its line to the point of destination, without discrimination in favor of or against any locality or person. (Code, § 4005.)

(2) (a) *Time for transporting freight; penalties for delay*—When freight, in proper condition, either in carloads or less, is tendered to a railroad or transportation company for shipment, and correct shipping instructions are given, the

agent must immediately receive the same for shipment and issue bills of lading therefor. Shipment must be made at the rate of 50 miles per day of 24 hours, computing from 7 a. m. the next day; but where the length of haul is under 50 miles, the shipment must be made within 24 hours. For failure herein, the company must pay, upon demand in writing, to the consignee, or his assignee in writing, having a substantial interest, \$2 per car per day, or fraction thereof, on all carload freight, and two cents per 100 pounds per day, or fraction thereof, on freight in less than carloads, with minimum charge of 10 cents for any one package. In computing the time of freight in transit, 24 hours is allowed at each junction point where transfer from one railroad to another is involved (12 hours to each); and 24 hours from the rehandling of freight at any other point from one car to another where necessary. The time of delay on account of accident, or for necessary repairs at junction points where transfer from one railroad to another is involved, or for any cause not within the company's power to prevent, is allowed as additional free time.

(b) *Filing claims for delays*—Claims for delays in shipments moving over more than one line must be filed with the originating terminal line, and if that line denies responsibility for the delay or any part thereof, it must report within 10 days to the claimant all the particulars of the movement over its own line; and, if it appears from such report that the delay or part thereof occurred on some other line or lines, the claimant may file a separate claim or claims against such other line or lines (who must report within 10 days to complainant), and may recover from the line or lines found to be responsible, the amount or amounts due under these rules, or any of them.

(c) *Time for switching out-going freight; penalty for delay*—When freight has been loaded into a car on a track within the switching limits of two or more carriers at and around a junction point, and is forwarded in the same car to a point within such switching limits on or reached by way of the road of any other carrier than that which places the car for loading, 24 hours must be allowed each carrier over whose road such freight is transported, computing from the time at which instructions for such movement are given to the first carrier. If destination is beyond such switching limits, Rule II will govern the movement over the road by which the

car passes out of the switching limits, beginning with the time at which it receives the car from its connecting road.

If the car contains freight for various destinations beyond the switching limits of any one of the carriers and is re-handled at a depot of such carrier before forwarding beyond such limits, this rule is to be effective as to such carrier from the time that the goods are unloaded from the car in which received.

For failure to comply with the terms of this section, the offending carrier or carriers shall pay, either to the shipper or his assignee in writing, having a substantial interest, \$2 per car per day, or fraction thereof, for the first 4 days, and \$5 per day thereafter: (Rule II, "Car Service Section," p 25.)

(3) *Notice to consignee of arrival; penalty for failure*—A railroad or transportation company must, within 24 hours after arrival of shipments, give notice by mail or otherwise, to consignee, of the arrival, such notice to contain car initials and number, point of shipment, contents and if transferred in transit, the initial and number of original car. For a failure herein the company forfeits and pays, either to the consignee or his assignee in writing, having a substantial interest, \$2 per car per day or fraction thereof for the first four days, and \$5 per day thereafter, on all carload shipments, and 2 cents per 100 pounds per day or fraction thereof, on freight in less than carloads, minimum charge of 10 cents for any one package, after the expiration of 24 hours.

This rule is applicable also to steamboat and steamship lines, in cases of shipments to Richmond, Alexandria, Fredericksburg, Petersburg, Norfolk, Portsmouth, Newport News, Hampton, Smithfield, City Point, West Point, Suffolk; and no wharfage, storage or demurrage charges are to be made on shipments arriving by water at other points. Rule III "Car Service Section," p. 27.

(4) *Time for unloading freight at depots, or placing loaded cars on tracks, penalty for failure*—(a) A railroad or transportation company must deliver freight at their depots or warehouses, or, in case of shipments for track delivery on their own lines or a private siding used in connection therewith, must place loaded cars at an accessible place for unloading, within 24 hours after their arrival, computing from 7 a. m. next day, unless withheld for any reason for which the consignee is responsible. But carload shipments for track deliv-

ery at local stations having not more than one team track, must be placed at an accessible point for unloading by the conductor on the train on which the car arrives. The consignee or his assignee in writing, having a substantial interest, is paid \$2 per car per day or fraction thereof for the first 4 days, and \$5 per day thereafter.

(b) Carload freight, or freight taking track delivery, if delivered within yard limits of a carrier other than that over whose road such freight arrived, shall be switched to the road of such other carrier within 24 hours from the time so ordered after arrival at destination (settlement of charges and, when necessary, surrender of bill of lading having been accomplished); such other carrier shall place such freight for unloading within 24 hours after receiving it. If switching by more than two carriers is involved, 24 hours shall be allowed for each carrier participating. When such a car is refused by any carrier by which it is to be switched because out of order by reason of defective air-brakes or absence of air-brakes, then the carrier having possession thereof shall forthwith make the necessary repairs or transfer the lading to a proper car and the time thus properly consumed, not exceeding 48 hours may be added to the time allowed for the movement.

For failure to comply with the terms of this section the offending carrier or carriers shall pay either to the consignee or his assignees in writing, having a substantial interest, the sum of \$2 per car per day for each of the first 4 days or fraction of a day, and \$5 per car per day for each succeeding day or fraction thereof for such delay.

(c) Should a consignee request that a car containing a shipment be weighed on track scales after notice of arrival thereof is given, at a place where there are such scales, the railroad company performing this service shall be allowed additional free time therefor of 36 hours, if that company has already placed the car for unloading, or 24 hours if it has not already so placed the car. (Rule IV. "Car Service Section," p. 27.)

DEMURRAGE RULES

(5) *Cars subject to rules*—Cars of either railroad or private ownership, held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose (including cars held for loading company material,

unless the loading is done by the railroad for which the material is intended and on its tracks) are subject to these demurrage rules, except as follows:

(a) Cars under load with company material for use of and consigned to the railroad in whose possession the cars are held.

(b) Cars under load with live stock. This exemption does not include cars held for or by shippers for loading live stock. Live poultry will not be considered as live stock.

(c) Empty cars placed for loading coal at coal mines, coal mine sidings, coal washers or coke at coke ovens and such cars under load with coal, at such mines, mine sidings or coal washers, or with coke at coke ovens. This exemption applies only at mines, coal washers and ovens, which are subject to car distribution rules in lieu of demurrage rules.

(d) Private care on private tracks when the ownership of the car and track is the same. (See (9) and (13), below.)

(A private track is a track outside of carrier's right of way, yard and terminals, and of which the carrier does not own either the rails, ties, roadbed, or right of way; or a track or a portion of a track which is devoted to the purposes of its user either by lease or written agreement.)

Empty private cars stored on railroad or private tracks, including such cars sent by the owner to a shipper for loading, provided the cars have not been placed or tendered for loading on the orders of a shipper. See (10), (D), below. Rule I. "Demurrage Rules Section," p. 4.)

(6) *Free time allowed*—(A) 48 hours (some roads have recently allowed 7 days or longer time) free time will be allowed for loading all commodities, and 48 hours free time will be allowed for unloading all commodities, except fertilizers, hay, straw, coal, coke, brick and lumber in covered cars and the following articles in bulk: meat, potatoes, grain, grain products, glass bottles, cotton seed, cotton seed bulbs, which commodities will be allowed 72 hours free time; but when held to complete loading or to partly unload, 24 hours, unless otherwise provided below.

"*Loading*" includes the furnishing of forwarding directions on outbound cars.

"*Unloading*" includes:

(a) Surrender of bill of lading on shipments billed "to order."

(b) Payment of lawful freight charges when required prior to delivery of the car.

(c) Furnishing of a "turn-over" order (an order for delivery to another party) after car has been placed for delivery and no additional movement of the car is made.

When the same car is both unloaded and reloaded, each transaction will be treated as independent of the other. This will also apply to industries performing their own switching service, in which case the industry must notify the carrier date and time car was unloaded.

When a car held for loading or unloading is moved by railroad or private power to another point in the same yard or industry to complete loading or unloading, the prescribed free time will be allowed, except that when the carrier makes a charge for such movement the time incident thereto shall not be computed against the car. (See (11), N. 2, below.)

If a consignee wishes his car held at any break-up yard or a hold-yard before notification and placement, such car will be subject to demurrage. That is to say, the time held in the break-up yard will be included within the forty-eight hours of free time. If he wishes to exempt his car from the imposition of demurrage he must either, by general orders given to the carrier or by specific orders as to incoming freight, notify the carrier of the track upon which he wishes his freight placed in which event he will have the full forty-eight hours free time from the time when the placement is made upon the track designated. This applies except when in conflict with (a) below.

(B) 24 hours free time will be allowed:

(a) When cars are held for reconsignment, diversion or reshipment or held in transit on order of consignor, consignee or owner. (This does not apply in case of (c) below.)

The term "diversion" or "reconsignment" will be applied as defined in the reconsignment tariffs of this carrier, except that under this rule when a car is placed for delivery at destination a "turnover" (or arder for delivery to another party) which does not involve an additional movement of the car is not a reconsignment. (See (A) above.)

A reshipment is the making of a new contract by which under a new rate the original lading, without being unloaded, is forwarded in the same car to another destination.

(b) When cars, destined for delivery to or for forwarding by a connecting line, are held under tariff regulations for surrender of bill of lading or payment of lawful freight charges.

(c) When cars are held in transit and placed for inspection or grading, including reconsignment or other disposition orders. At stations where grain and hay must be inspected or graded, the consignee agreeing with the carrier in writing for file at the station, to accept the bulletining of the cars as due and adequate notice of arrival, the bulletins must be posted by 9 A. M. of each day, showing the previous 24 hours receipts, and the free time (24 hours) is to be calculated from the first 7 A. M., thereafter. Where there is no agreement for bulletining of cars, the free time must be calculated from the first 7:00 A. M., after the day on which notice of arrival is sent or given to the consignee.

(d) Except as otherwise provided in (A). above, when cars are held to complete loading, or to partly unload.

(When a car held for unloading is partly unloaded and partly reloaded, 48 hours' free time will be allowed for the entire transaction.)

(d) On cars containing freight in bond for Customs entry and Government inspection.

(C) Cars containing freight for transshipment to vessel will be allowed such free time at the port as may be provided in the tariffs of the individual carriers lawfully on file with the Interstate Commerce Commission.

(D) A consignee or consignor, located five miles or more from a depot, and whose freight is destined to or from his place of business, or residence so located, shall not be subject to storage or demurrage charges allowed in these rules, until sufficient time has elapsed after notice for said consignee or consignor to remove or load his goods by the exercise of ordinary diligence. The time limit for loading or unloading shall not exceed four days. Claims must be filed with the carrier's agent within thirty days after date on which demurrage bill is rendered. (Rule II. "Demurrage Rules Section," p. 5).

(7) *Computing time*—(In computing time, Sundays and legal holidays (National, State and Municipal), but not half holidays will be excluded, except as otherwise provided in (13), (A), below. When a legal holiday falls on Sunday the following Monday will be excluded.)

(A) On cars held for loading, time will be computed from the first 7:00 A. M. after placement on public delivery tracks and without notice of placement, but if not placed within 24 hours after 7:00 A. M., of the day for which ordered, time will be computed from 7:00 A. M. after the day on which notice of placement is sent or given to consignor. (See (10), below.)

(B) (1) On cars held for orders, surrender of bill of lading or payment of freight charges, whether such cars have been placed in position to unload or not, time will be computed from the first 7:00 A. M. after the day on which notice of arrival is sent or given to the consignee or party entitled to receive same. (See (8) below.)

(The time between receipt of order and placement of car (not to include the time attributable to the act or neglect of consignor or consignee) will be deducted from the total detention to the car.)

(2) Orders for disposition or reconsignment, when mailed, wired or otherwise transmitted by the reconsignor to agent of the carrier at point where cars are held, or to the agent of any carrier named in the bill of lading contract or participating in the transportation transaction, unless otherwise provided by tariff, will release cars at 7:00 A. M., of the date such orders are received by any such agent, provided they are sent or given prior to the date received. Such orders mailed, wired or otherwise transmitted and received the same date, will release cars at the hour the orders are received by any such agent. Date of mailing to be determined by the postmark.

(When order releasing a car is sent to this carrier by United States mail and the order is not received by the addressee, the car shall be considered released as of the date the order should have been delivered, provided proof is furnished by the claimant that the order was deposited in the United States mail properly stamped and addressed on the date claimed.

(C) (1) On cars held for unloading except as otherwise provided in section B, paragraph 1, of this rule, time will be computed from the first 7:00 A. M. after placement on public delivery tracks, and after the day on which notice of arrival is sent or given to consignee or party entitled to receive

same. If car is not placed within 24 hours after notice of arrival has been sent or given, time will be computed from the first 7 A. M. after the day on which notice of placement has been sent or given to the consignee or party entitled to receive same. (See (8), (A) and (D), below.)

(2) On cars subject to Rule 5 (see (9), (B), (2), below), time will be computed from the first 7:00 A. M. after the day on which notice as required by Rule 5, (see (9), (B), (1), below), is sent or given to the consignee or party entitled to receive same.

(D) On cars to be delivered on other than public delivery tracks, time will be computed from the first 7:00 A. M. after actual or constructive placement on such tracks. Time computed from actual placement on cars placed at exactly 7:00 A. M., will begin at the same 7:00 A. M., actual placement to be determined by the precise time the engine cuts loose. (See (8), (C), and (9) and (10), below.)

(Note: (1) "Actual Placement" is made when a car is placed in an accessible position for loading or unloading or at a point previously designated by the consignor or consignee. If such placing is prevented from any cause attributable to consignor or consignee and car is placed on the private or other-than-public-delivery track serving the consignor or consignee, it shall be considered constructively placed without notice.

(2) Any railroad track or portion thereof assigned for individual use will be treated as "other-than-public-delivery track."

(E) On cars to be delivered on interchange tracks of industrial plants performing the switching service for themselves or other parties, time will be computed from the first 7:00 A. M. after actual or constructive placement on such interchange tracks until return to the same or another interchange track. Time computed from the actual placement on cars placed at exactly 7:00 A. M. will begin at the same 7:00 A. M.; actual placement to be determined by the precise time the engine cuts loose. (See (8), (C), and (9) and (10), above.) Cars returned loaded will not be recorded released until necessary billing instructions are furnished.

Where two or more parties take delivery from the same interchange track, or where the carrier uses the interchange

track for other cars, or where the interchange track is not adjacent to the plant and the industry uses the carrier's tracks to reach same, a notice of placement shall be sent or given to the consignee and time will be computed from the first 7:00 A. M. thereafter. (Rule III. "Demurrage Rules Section," p. 7.)

(8) *Notification*—(A) Notice of arrival shall be sent or given consignee or party entitled to receive same by this carrier's agent in writing or, in lieu thereof, as otherwise agreed to in writing by this carrier and consignee, within 24 hours after arrival of car and billing at destination (see (7) above) such notice to contain car initials and number, point of shipment, contents, and if transferred in transit, the initial and number of original car. When address of consignee does not appear on billing, and is not known, the notice of arrival must be deposited in the United States mail enclosed in a stamped envelope bearing return address, same to be preserved on file if returned. An impression copy shall be retained, and when notice is sent or given on a postal card the impression shall be of both sides. (See (7), (B) and (C) above). In case a car subject to Rule 3 (see (7), (C), above) is not placed on public delivery track within 24 hours after notice of arrival has been sent or given, notice of placement shall be sent or given to consignee.

(When owner requests that original point of shipment be omitted on reconsigned cars, this information shall not be shown on notice of arrival at destination.)

(B) When cars are ordered stopped in transit notice shall be sent or given the party ordering the cars stopped upon arrival of cars at point of stoppage.

(C) Delivery of cars upon other-than-public-delivery tracks or upon industrial interchange tracks, or written notice sent or given to consignee or party entitled to receive same, of readiness to so deliver, will constitute notification to consignee. (See (12), (D), (1), (b), below.)

(D) In all cases where any part of the contents of a car has been removed by the consignee prior to the sending or giving of required notice, such removal shall be considered as notice of arrival.

(E), (1) When carload freight is refused at destination, notice of such refusal shall, within 24 hours thereafter, be

sent by wire to consignor, when known, at his expense or when not known, to agent at point of shipment, who shall be required promptly to notify the shipper if known.

(2) (a) When unclaimed perishable carload freight has not been disposed of within two days from the first 7:00 A. M. after the day on which notice of arrival has been sent or given to consignee, notice to that effect shall be sent by wire as provided in (1) of this section.

(b) When other carload freight is unclaimed within five days from the first 7:00 A. M. after the day on which notice of arrival has been sent or given to the consignee, a notice to that effect shall be sent by wire as provided in (1) of this section. (See (12), (D), (4), below.) (Rule IV. "Demurrage Rules Section," p. 9.)

(9) *Placing cars for unloading*—(Under this rule the time of movement between hold point and destination, and any other time for which the carrier is responsible will not be computed against the consignee.)

(A) (1) When delivery of a car consigned or ordered to an industrial interchange track or to other-than-public-delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination or, if it cannot reasonably be accommodated there, at the nearest available hold point, and written notice that the car is held and that this carrier is unable to deliver will be sent or given to the consignee. This will be considered constructive placement. (See (7), (D) and (E), above.)

(2) On a car to be delivered to a switching line for final delivery and which consignee located on switching line is unable to receive and which for that reason the switching line is unable to receive from this carrier, notice will be sent or given the switching line showing point of shipment, car initials and numbers, contents and consignee and if transferred in transit the initials and number of the original car.

(3) When this carrier is the switching line and under conditions set forth in (1) is unable to receive cars from a connecting line at destination for delivery within switching limits, upon receipt of notice from connecting line it will notify the consignee and put such cars under constructive placement. (See (7), (C), above.)

(B) (1) When delivery cannot be made on specially designated public-delivery tracks, on account of such tracks being fully occupied, or from other causes beyond the control of this railroad, notice shall be sent or given the consignee in writing or, in lieu thereof, as otherwise agreed to in writing that delivery will be made at the nearest available point to the consignee, naming the point. Such delivery shall be made unless the consignee shall before delivery indicate a preferred available point, in which case the preferred delivery will be made.

(2) In the event consignee or party entitled to receive shipment serves notice upon this railroad of refusal to accept delivery at the point named in notice sent or given accordance with Paragraph 1, the car will be held awaiting opportunity to deliver on the specially designated track subject to Rule 3. (See (7), (C), (2), above.) (Rule V. "Demurrage Rules Section," p. 10.)

(10) *Cars for loading*—(A) Cars for loading will be considered placed when such cars are actually placed or held on orders of the consignor. In the latter case the agent must send or give the consignor written notice of all cars which he has been unable to place because of condition of the other-than-public-delivery track or because of other conditions attributable to the consignor. This will be considered constructive placement. (See (7), (D), and (E) above.)

(B) When empty cars placed on orders are not used in transportation service, demurrage will be charged from the first 7:00 A. M. after actual or constructive placement until released, with no free time allowance.

(C), (1) "Cars received from a switching line and held by this railroad for forwarding directions are subject to demurrage charges from the first 7:00 A. M. after they are received, until proper forwarding directions are furnished, with no free time allowance and without notice, except that cars received between 4:00 P. M. and 7:00 A. M. will not be subject to demurrage if forwarding directions are received prior to the following 12:00 noon.

(2) Private cars which have been loaded on the tracks of their owners, received from such tracks and held by this railroad for forwarding directions, are subject to demurrage charges from the first 7:00 A. M., after they are received

until proper forwarding directions are furnished, with no free time allowance and without notice.

(D) If an empty car is appropriated without being ordered it shall be considered as having been ordered and actually placed at the time so appropriated. If not loaded outbound, such car is subject to (B) of this rule. (Rule VI. "Demurrage Rules Section," p. 11.)

(11) *Demurrage charged.* (A) On cars not subject to Rule 9 (see 13, below): After the expiration of free time allowed, the following charges per car per day, or fraction of a day, will be made until car is released: For each of the first four days, \$2.00; for each succeeding day, \$5.00.

(B) The charges on cars subject to average agreement are set forth in Rule 9 (see (13) below).

(NOTE: (1) When through no fault of the consignor or consignee, the lading of a car is transferred by a carrier into two or more cars, or when two small cars are furnished by a carrier in lieu of one large car ordered by the shipper, demurrage will be charged as for one car only, as long as any of such cars are detained beyond the free time.

(2) When a car contains two or more minimum carload shipments consigned to more than one consignee at the same station, demurrage will be charged the same as if the shipments had been received in separate cars, and each consignee will be allowed the prescribed free time for unloading, free of interference by the other consignee or consignees.) (Rule VII. "Demurrage Rules Section," p. 12.)

(12) *Claims*—No demurrage charges shall be collected under these rules for detention of cars through causes named below. Demurrage charges assessed or collected under such conditions shall be promptly cancelled or refunded by this carrier.

(A)—*Weather interference*—

(A consignor or consignee shall not be absolved from demurrage under section (A) of this rule, if considering the character of the freight, others similarly situated and under the same conditions reasonably could and did load or unload cars during the same period of time.)

(1) When the condition of the weather during any part of the prescribed free time (or the adjusted free time provided for in section (B) of this rule) is such as to make it

impossible for men or teams to work at loading or unloading, or impossible to place freight in cars or move it from cars, without serious injury to the freight, or when, because of high water or snow drifts (see note) it is impossible, during the prescribed free time, to get to the cars for loading or unloading, the free time will be extended until a total of free time prescribed in Rule 2 (see (6) above), free from such interference shall have been allowed. No additional time will be allowed unless claim, stating fully the conditions which prevented loading or unloading within the free time, is presented in writing to this carrier's agent within thirty days after the date on which demurrage bill is rendered. (The extension of free time on account of high water or snow drifts shall apply to other-than-public-delivery tracks only when there is disability of this railroad.)

(2) When the lading is frozen while in transit so as to require more than the prescribed free time to remove it from the car, the total time actually expended by consignee in heating, thawing or loosening and receiving it will be considered as free time, but no allowance will be made for detention during the time that no effort is made to unload. This rule will not apply to shipments which are tendered in a condition to unload. Under this rule, consignee shall not be entitled to additional time, unless within the prescribed free time, he shall serve upon the carrier's agent a written statement that the lading was frozen when tendered.

(3) No allowance on account of weather interference shall be made on cars subject to Rule 6 (see (10), (B), above).

(B) *Bunching.*—

(1) *Cars for loading.*—When, by reason of delay or irregularity in filling orders, cars are bunched and placed for loading in accumulated numbers in excess of daily placing as ordered, the shipper shall be allowed such free time for loading as he would have been entitled to had the cars been placed for loading as ordered.

(2) *Cars for unloading or reconsigning.*—When, as the result of the act or neglect of any carrier, cars originating at the same point or at intermediate points, moving via the same route and destined for one consignee, at one point, are bunched at originating point in transit or at destination, and

delivered by this carrier in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars not been bunched but when any car is released before the expiration of such free time, the free time on the next car will be computed from the first 7:00 A. M. following such release; provided, however, no allowance will be made unless claim is presented in writing to this railroad's agent within thirty days after the date on which demurrage bill is rendered and supported by statement showing date and point of shipment of each car.

(C) *Demand of overcharge.*—When this carrier's agent demands the payment of transportation charges in excess of tariff authority.

(D) *Delayed or improper notice by this railroad.*

(1) (a) When notice of arrival does not contain all the information specified in Rule 4 (see (10), (A), above), consignee shall not have the right to call in question the sufficiency of such notice, unless within the prescribed free time. He shall serve upon this carrier's agent a written statement of the omitted information required, in which event the time between receipt of such statement and the furnishing of the omitted information will not be computed against the consignee.

(b) When the consignee makes request in writing for the name of the consignor, point of shipment and (or), if transferred in transit, the initials and number of the original car, to enable him to identify the shipment in a car placed or tendered for delivery on other-than-public-delivery track, such information will be furnished, but consignee shall not be entitled to additional free time unless such request has been served on this carrier's agent within the prescribed free time, in which event the time between receipt of the request and compliance therewith will not be computed against the consignee. (See (10), (A), last paragraph.)

(2) When claim is made that a mailed notice has been delayed, postmark thereon shall be accepted as indicating the date of the notice.

(3) When a notice is mailed by this carrier on Sunday, a legal holiday, or after 3 P. M. on other days (as evidenced by the postmark thereon) consignee shall be allowed five hours'

additional free time provided he shall send or give to this carrier's agent, within the first 24 hours of free time, written advice that the notice had not been received until after the free time had begun to run; in case of failure on the part of consignees so to advise this carrier's agent, no additional free time shall be allowed.

(4) In case of failure by this carrier to send notice in accordance with the provisions of Rule 4 (see (10), (E), above), the consignor shall not be held liable for demurrage charges between the date the notice should have been sent and the date it was actually sent.

(E) *Error of any carrier which prevents proper tender or delivery.*

(1) Under this rule demurrage will be charged on the basis of the amount that would have accrued but for such error. This also applies in the case of constructively placed cars being "run-around" by actually placing recent arrivals ahead of previous arrivals, but allowance will only be made on cars subject to Rule 9 (Rule VIII. see (13), below) that are held beyond the fourth debit day.

(F) *Delay by U. S. Customs.*—Such additional free time shall be allowed as has been lost through such delay. ("Demurrage Rules Section," p. 12.)

(13) *Average agreement.*—When the following agreement has been entered into, the charge for detention of cars, on all cars subject to demurrage, held for loading or unloading, shall be computed on the basis of the average time of detention to all such cars released during each calendar month; such average detention and charge to be computed as follows:

(A) One credit will be allowed for each car, released within the first 24 hours of free time. After the expiration of 48 hours' free time, one debit per car per day, or fraction of a day, will be charged for each of the first four days. In no case shall more than one credit be allowed on any one car, and in no case shall more than four credits be applied in cancellation of debits accruing on any one car. When a car has accrued four debits a charge of \$5.00 per car per day, or fraction of a day, will be made for all subsequent detention and will apply on all subsequent Sundays and legal holidays,

including a Sunday or holiday immediately following the day on which the fourth debit begins to run.

(B) Credits earned on cars held for loading shall not be used in off-setting debits accruing on cars held for unloading nor shall credits earned on cars held for unloading be used in offsetting debits accruing on cars held for loading.

(C) Credits cannot be earned by private cars subjects to rule 1 (see (5), (B), (4), (a), above), but debits charged on such private cars while under constructive placement may be off-set by credits earned on other cars.

(D) At the end of the calendar month, the total number of credits will be deducted from the total number of debits and \$2 per debit will be charged for the remainder. If the credits equal or exceed the debits no charge will be made for the detention of the cars and no payment will be made by this carrier on account of such excess of credits; nor shall the credits in excess of the debits of any one month be considered in computing the average detention for another month.

(E) A party who enters into this average agreement shall not be entitled to include therein cars subject to Rule 2, (see (6), (B), above) nor shall he be entitled to cancellation or refund of demurrage charges under Rule 8. (See (12), (A), (1), and (B), above.)

(F) A party who enters into this average agreement may be required to give sufficient security to this carrier for payment of balances against him at the end of each month.

(G) An average agreement must include all cars loaded or unloaded within the jurisdiction of the same station, except that when desired separate agreements may be entered into for each plant or yard within the jurisdiction of the same station, but in no case can the cars loaded or unloaded within the jurisdiction of two or more stations be combined in one average agreement, nor shall the cars loaded or unloaded by more than one consignor or consignee be combined in one average agreement, except that the cars consigned, reconsigned, or ordered to a public elevator, warehouse or cotton compress serving various parties may be combined in one average agreement.

The agreement may be as follows:

“_____ Railroad.

Being fully acquainted with the terms, conditions, and effect of the average basis for settling for detention to cars

as set forth in———, being the car demurrage rules governing at all stations and sidings on the lines of said railroad, except as shown in said tariff, and being desirous of availing (myself or ourselves) of this alternate method of settlement (I or *we*) do expressly agree to and with the———

———Railroad that with respect to all cars which may, during the continuance of this agreement, be handled for (*my* or *our*) account at———(Station) (*I* or *we*) will fully observe and comply with all the terms and conditions of said rules as they are now published or may hereafter be lawfully modified by duly published tariffs, and will make prompt payment of all demurrage charges accruing thereunder in accordance with the average basis as therein established or as hereafter lawfully modified by duly published tariffs.

This agreement to be effective on and after the———day of———, 192——, and to continue until termination by written notice from either party to the other, which notice shall become effective on the first day of the month succeeding that in which it is given.

Approved and accepted———, 192——, by and on behalf of the above named carrier by———.”
(Rule IX. “Demurrage Rules Section,” p. 15.)

STORAGE RULES SECTION

(14) *Freight subject to rules.*—Freight, except as provided in section (D) of this rule, received for delivery or held to complete a shipment or for forwarding directions, if stored in or on carrier premises, is subject to these storage rules. Shipments of less-than-carload freight, loaded into or delivered direct from cars, are subject to storage rules, but when the loading or unloading is done by shipper or consignee, either as required by classifications or tariffs, or at request of shipper or consignee, the cars are subject to demurrage rules and storage rules do not apply.

(Freight which is not liable to damage from the elements and which is not ordinarily handled through freight houses may be stored free, unless otherwise provided, on the vacant land of the carrier, pending shipment, and entirely at owner's risk, provided owner has previously been assigned space as far as available and without distinction.)

(A) Freight upon which the free time allowed under demurrage rules has expired while in cars, and subsequently unloaded in or on carrier premises, is subject to these storage rules when unloaded, without free time allowance.

(B) Carload shipments of explosives or other dangerous articles, are subject to both demurrage and storage rules. (See Rule 6.)

(C) Carload freight, other than explosives or other dangerous articles, held in cars for delivery and subsequently unloaded in or on carrier's premises, is subject to demurrage rules while in cars and to these storage rules after it is unloaded.

If unloaded or reloaded by the carrier the actual cost of the service will be in addition to the storage charge. (See (18) (C) below.)

(D) *Exceptions.*—The rules and charges herein will not apply on:

(1) Freight stored in warehouses owned and operated by carriers as exclusively storage warehouses.

(2) Export or import freight at the port of export or import.

(3) Domestic freight received from or intended for delivery to ocean or lake vessels at the port of transshipment.

(4) Freight subject to lighterage at seaboard points.

(5) Carload lots of coal, coke or ore. (Rule I. "Storage Rule Section," p. 17.)

(15) *Notification*—(A) Notice of arrival shall be sent to given consignee or party, entitled to receive same by this carrier's agent, in writing or, in lieu thereof, as otherwise agreed to in writing by this carrier and consignor, within twenty-four hours after arrival of shipment and billing at destination, such notice to contain car initials and number, point of shipment, contents and if transferred in transit, the initial and number of original car.

(B) *Refused or unclaimed freight*—(1) Where shipments have been plainly marked with the consignor's name and address, preceded by the word "from," notice shall be immediately sent or given consignor of refusal of less-than-carload shipments. Unclaimed less-than-carload shipments will be treated as refused after fifteen calendar days from the expiration of free time.

(2) Notice shall be sent or given the consignor of unclaimed or refused shipments of explosives or other dangerous articles on hand forty-eight hours, provided written request is received for this information by agent at point of origin at time of shipment. Such requests should be plainly written on a rectangular piece of paper of different color from any label required under the Interstate Commerce Commission's regulations and placed on the package in close proximity to such label (or to name of consignee).

(3) Where consignor requests that notice of unclaimed or refused shipments be sent by telegraph, this may only be done at his expense. (Rule II. "Storage Rule Section," p. 17.)

(16) *Free time allowed.*—(A) (1) 48 hours' free time will be allowed on all commodities, except as otherwise provided in Rule V. (See (18), (A), below), and also except the more dangerous explosives, as described in Rule VI. (see (19), (A), below) for the removal of inbound freight from car or carrier's premises, or to complete a carload shipment and furnish forwarding directions therefor.

Exception—On less-than-carload shipments consigned to parties located at interior or at non-railroad points, the following allowance of free time will be made when hauled:

Five miles and not over 20 miles from the station, 5 days.

Over 20 miles and not over 30 miles from the station, 10 days.

Over 30 miles from the station, 15 days.

(2) Outbound less-than-carload freight not accompanied by proper shipping directions which will permit forwarding on date received, will be subject to storage charges from the first 7:00 A. M. after receipt of the shipment with no free time allowance.

(B) 24 hours' free time will be allowed.

(1) On less-than-carload freight held to complete a shipment.

(2) On less-than-carload freight held for reshipment.

(3) On the more dangerous explosives (as described in Rule 6—see (19), (A), below) for removal of inbound freight from car on carrier's premises or to complete a carload shipment outbound and furnish forwarding directions therefor.

(Outbound less-than-carload shipments of the more

dangerous explosives not accompanied by proper shipping directions which will permit forwarding on the date received will not be accepted.)

(4) On carload shipments of explosives and other dangerous articles, reconsigned or reshipped in the same car received.

(C) Freight for transshipment to vessel will be allowed such full time at the port as may be provided in the tariff of the individual carriers, lawfully on file with the Interstate Commerce Commission. (Rule III. "Storage Rules Section," p. 18.)

(17) *Computing time*—(A) In computing time any fractional part of 100 pounds will be computed as 100 pounds and any fractional part of 24 hours will be computed as one day.

(B) In computing free time, Sundays and legal holidays (National, State and Municipal) will be excluded, except as otherwise provided in Rule 6 (see (19), below). When a legal full holiday falls on Sunday, the following Monday will be excluded.

(C) On inbound freight held for removal and on freight held for reconsignment or reshipment, time will be computed from the first 7:00 A. M. after day on which notice of arrival is sent or given to consignee.

(D) On outbound freight, time will be computed from the first 7:00 A. M. after receipt in or on carrier premises.

(E) On outbound carloads of explosives and other dangerous articles (as described in Rule 6—see (19), below), time will be computed from the first 7:00 A. M. after loading is begun.

(F) When orders for freight held for disposition or reconsignment are mailed, such orders will release freight at 7:00 A. M. of the date orders are received at the station where the freight is held, provided the orders are mailed prior to the date received, but orders mailed and received on the same date release freight the following 7:00 A. M.

(18) *Charges for storage on freight other than explosives and other dangerous articles*.—(A) (1) Freight, except automobiles or other self-propelling vehicles (but not excepting motorcycles or bicycle motor wheels), held in or on carrier's premises in excess of free time allowed, will be subject

to the following storage charges per day or at option of carrier may be sent to public warehouses:

For each of the first five days, 2 cents per 100 pounds.

For the sixth and each succeeding day, 3 cents per 100 pounds.

Minimum storage charge per shipment on freight held beyond free time, five (5) days or part thereof, 25 cents; six (6) days or more, 50 cents.

In carload-quantities, not more than twenty cents per ton of two thousand pounds per day, or fraction thereof, but not exceeding \$2.00 per car per day for each of the first four days or fraction thereof, and \$5.00 per car per day for each succeeding day or fraction thereof.

(2) This rule shall apply also to steamboat and steamship companies unloading package freight in or on carrier's premises at places named in Rule III of the "Car Service Rules Section" herein (see (3) above), except 72 hours of free time shall be allowed instead of 48 hours.

(B) After expiration of free time, automobiles or other self-propelling vehicles (except motorcycles and bicycle motor wheels) will be subject to a storage charge of three (3) cents per 100 pounds, per day, with a minimum charge of \$1.00 per machine per day for each of the first five (5) days, and \$2.00 per machine for each succeeding day, or at option of carrier, may be sent to public warehouses.

(C) When carload freight is unloaded by the carrier for the purpose of releasing needed equipment, the storage charge will be the same as would have accrued under car demurrage rules had the freight remained in the car. (See (14), above.) (Rule V. "Storage Rules Section," p. 20.)

(19) *Charges for storage on explosives and other dangerous articles.*—(1), (2), and (3), below, contain extracts from the Regulations Prescribed by the Interstate Commerce Commission:

(1) Paragraph 1433 * * * "consignee must remove such shipments from the carrier's property within 48 hours after notice of arrival at destination, Sundays and holidays not included."

(2) Paragraph 1643 (a) * * * "If a shipment of explosives is not removed within 48 hours after notice of arrival at destination, it must be disposed of by return to the shipper,

or by storage at the expense of the owner, or by sale, or when necessary to safety by destruction under supervision of a competent person."

(3) Paragraph 1714 * * * "consignee must remove such shipments from the carrier's property within 48 hours after notice of arrival at destination, Sundays and holidays not included."

Storage will be charged at the following rates per day of 24 hours or fraction thereof, on explosives or other dangerous articles, held in or on railroad premises, in excess of free time allowed;

(A) On shipments of the more dangerous explosives, i. e., low explosives, black powder, high explosives, wet fulminate of mercury, blasting caps, electric blasting caps, ammunition for cannon with explosive projectiles, explosive torpedoes, explosive mines, explosive bombs and detonating fuzes; on less than carload shipments of such articles 25 cents per 100 pounds per day, with a minimum charge of 50 cents per shipment.

On shipments of such articles held in cars when the loading or unloading is done by shipper or consignee, either as required by classification or tariffs, or at request of shipper or consignee, \$5 per car per day (Sundays and legal holidays excluded) in addition to the regular demurrage and track storage charges.

(B) On shipment of the less dangerous and relatively safe explosives, i. e., ammunition for cannon with empty projectiles, ammunition for cannon with sand loaded projectiles, ammunition for cannon with solid projectiles, ammunition for cannon without projectiles, smokeless powder for cannon, smokeless powder for small arms, common fireworks, special fireworks, small arms ammunition, cannon primers, empty cartridge bags, black powder igniters, empty cartridge shells, primed, combination primers, percussion fuzes, time, tracer or percussion caps, combination fuzes, safety fuze, instantaneous fuze, Cordeau detonant and safety squibs, or less-than-carload shipments of dangerous articles other than explosives requiring red, yellow, green or white I. C. C. labels, on less than carload shipments of such articles ten (10) cents per 100 pounds per day with a minimum charge of twenty-five (25) cents per shipment.

On shipments of the less dangerous and relatively safe explosives, which under the I. C. C. regulations require "INFLAMMABLE" placards, or which do not require placards, and on shipments of dangerous articles other than explosives which, under the I. C. C. regulations, require "INFLAMMABLE" or "ACID" placards, held in cars, when the loading or unloading is done by shippers or consignee, either as required by classification or tariffs, or at the request of shipper or consignee, \$2 per car per day (Sundays and legal holidays excluded) in addition to the regular demurrage and track storage charges.

(The term "Carriers' Premises," as used in this rule when applicable to carload shipments, shall embrace all tracks which this carrier provides for its own uses and purposes; and also private tracks constructed, maintained or operated under a written agreement by which this carrier reserves the right to use the whole or any part of them for itself or others than the party with whom the agreement is executed.)

(C) When shipments of the "more dangerous explosives" (see Section A) are not removed from the carrier's premises by the consignee within the legal limit (48 hours) after the first 7:00 A. M. following notice of arrival, the most practicable of the steps authorized by paragraph 1643 (a) as quoted above, must be taken to secure this removal.

When available, powder magazines not on carrier's property should be utilized for storage. (Rule VI. "Storage Rules Section," p. 20.)

(20) *Claims and causes therefor.*—No storage charges shall be collected under these rules for delays from causes named below. Storage charges assessed or collected under such conditions shall be promptly cancelled or refunded by the carrier.

(A) *Weather interference.*—(1) When the condition of the weather, during the prescribed free time, is such as to make it impossible to remove freight from carrier's premises without serious injury to the freight, the free time shall be extended until a total of 48 hours free from such weather interference shall have been allowed.

(2) When, because of high water or snow-drifts, it is impossible to remove freight from carrier's premises during the prescribed free time. But (1) and (2) shall not absolve a

consignee from liability for storage if others similarly situated and under the same conditions are able to remove freight.

(B) *Demand of overcharge.*—When carrier's agent demands the payment of transportation charges in excess of tariff authority.

(C) *Delayed or improper notice by carrier.*—When notice has been sent or given in substantial compliance with the requirements as specified in these rules, the consignee shall not thereafter have the right to call in question the sufficiency of such notice unless within 48 hours from 7:00 A. M. following the day on which notice is sent or given he shall serve upon the delivering carrier a full, written statement of his objections to the sufficiency of such notice.

(2) When claim is made that a mailed notice has been delayed, the postmark thereon shall be accepted as indicating the date of the notice.

(3) When a notice is mailed by carrier on Sunday, a legal holiday, or after 3:00 P. M. on other days (as evidenced by the postmark thereon), the consignee shall be allowed five hours additional free time, provided he shall mail or send to the carrier's agent, within the first twenty-four hours of free time, written advice that the notice had not been received until after the free time had begun to run. In case of failure on the part of consignee so to notify carrier's agent, no additional free time shall be allowed.

(4) In case of failure by the carrier to send or give notice in accordance with the provisions of Rule 2 (see (15), (B), above), no storage charges will be assessed between the date on which the notice shall have been sent or given and the date on which it was actually sent or given.

(D) *Carrier's errors which prevent proper tender or delivery.*—This rule will not apply on freight held on account of having been delayed or damaged in transit or on freight refused by consignee on account of shortage.

(E) *Delay by United States Customs.*—Such additional free time shall be allowed as has been lost through such delay. (Rule VII. "Storage Rules Section," p. 22.)

§ 10. *As to stoppage or seizure of goods in transit.*—the right to stop goods in transit is the right of a seller of goods upon credit, to reclaim and take possession of them, where the insolvency of the buyer occurs or becomes

known after the sale. The seller should give the carrier notice not to deliver the goods on account of the buyer's insolvency. The right of stoppage in transit is defeated by a transfer of the bill of lading to a *bona fide* purchaser. Goods in transit may be seized by attachment or other legal process, which of course, excuses their non-delivery by the carrier to the consignee, unless indeed they have been improperly seized. In case of seizure the carrier must notify the owner. (See general common law authorities.)

§ 11. Unclaimed freight or express.—If the company have any unclaimed freight, baggage, or express, not perishable, for 60 days, it may proceed to advertise and sell same at public auction, for transportation and storage charges, which claims same within 3 years, otherwise it is to be paid into the State Treasury to the credit of public schools. (Code, § 3933-4.)

III. COMMON CARRIER OF LIVE STOCK

§ 1. To receive and transport live stock; penalty for failure; injunction.—Every railroad company, upon payment or tender of the lawful rates, must receive, transport, and deliver at the termini of its main and branch lines and at intermediate depots, all live stock delivered or offered in proper condition to be thus transported, and also receive, transport, and deliver in like manner, all live stock delivered or offered to it for such purpose by any other railroad company; and every railroad company must at such termini or stations where it has a freight depot, provide all necessary facilities for receiving, loading, or unloading said live stock. For a violation hereof the company forfeits to the consignor or consignee or other injured party, from \$50 to \$200 in addition to actual damages sustained for every such refusal, to be recovered by motion or action: provided, that at stations where there are no facilities for receiving and delivering live stock and where the company is required by the preceding paragraph to receive live stock, 30 days notice must be given before any stock is tendered for shipment in order to give time to the company to provide suitable facilities for handling the stock.

The company may be restrained by injunction from further violations of the first paragraph of this section and enjoined to obey the provisions thereof. (Code, § 4006.) For

when company must water live stock awaiting shipment. See Acts 1920, p. 817.

§ 2. Liability of carriers of live stock.—A common carrier of live stock is governed by the same law as a common carrier of other goods (see division II., above); but if the loss or injury is due to the peculiar nature and propensities of the animals, the carrier is not liable unless the loss or injury could have been prevented by the exercise of reasonable care, foresight, or vigilance. Carriers have been excused from liability in the following instances: Where a horse's shoes were not removed, or halter was attached to his jaw in such a manner as to cause restlessness; where the shipper loaded the cars improperly; where an animal dies or is injured by heat or cold, or want of food, without any negligence on the carrier's part; where a horse kicks and kills another, the car being suitable and proper care being taken to prevent such injuries; where a mule kicks through the slats at the side of the car and is killed, without the carrier's fault; where an unruly jack is thrown from a ferry-boat, through his own restlessness or viciousness, the ferrymen being guilty of no negligence, and the like.

Where the carrier's negligence is the primary cause of the injury, though the injury would not have occurred but for the nature and propensities of the live stock, the carrier is responsible; as, where hogs became heated from being overcrowded, and the carrier when informed of the fact neglected to apply water to them, alleging that his pump was out of repair; where, owing to the wreck of a passenger train, a carload of hogs was delayed twelve hours without being unloaded or receiving attention, and injury resulted from "piling up" of the animals or their struggling to get to or away from the car doors, which propensity is only exhibited when the train is standing; where, because of an unreasonable or negligent delay, animals perish of cold; where, on leaving a car window open or like negligence, animals escape; and the like cases. (See general common law authorities.)

Under the statute (Code, § 3926), a common carrier of live stock is liable for loss or injury caused by its negligence or the negligence of any connecting line, as in the case of other freight; and its liability cannot be waived or limited by con-

tract—not even as to the value of the stock. See section 8, of division II., above.

The carrier is bound to provide suitable cars and appliances for transporting live stock (having regard to the character or viciousness of the animal), and the same must be kept in good order. (Code, § 3937.)

Unless imposed upon the shipper by contract, it is the duty of the carrier to load and unload live stock, feed and water them, and to care for them generally during shipment, and for failure of any duty in this respect the carrier is liable.

By a Federal statute, a railroad company engaged in transporting cattle, sheep, swine, or other animals from one state to another is prohibited from confining the same in its cars for a longer period than 28 consecutive hours without unloading the same for a rest, water and feeding, for a period of at least 5 consecutive hours, unless prevented from doing so by storm or other accidental cause. (U. S. Rev. Stat., §§ 4386-8.) And although a penalty of \$100 to \$500 is imposed for a violation of this regulation, yet the carrier is liable to the shipper for injuries resulting to animals from such violation.

§ 3. As to transporting of diseased stock.—See Code, §§ 906-20.

IV. CARRIER OF PASSENGERS

§ 1. When ticket office and waiting room to be opened; announcement of stations; penalty.—Railroad companies must keep their ticket offices open for the sale of tickets at least 30 minutes before the schedule time of departure of trains; and must open the waiting room for passengers at least one hour before the schedule time of departure of trains, and keep it open and comfortably warm in cold weather until the trains depart. They must cause to be announced within each passenger car, except sleeping cars, within a reasonable time before its arrival at a station, the name of the station; and at junctions, crossings, and points where trains leave at or near the same time in different directions, they must cause to be announced in each car the direction in which such car is to go. A refusal or failure to comply with this section is punishable by a fine of \$10. (Code, § 3940.)

§ 2. Posting notice of delay of trains.—In the case of

delays, the company must immediately, upon learning of such delay, post in some conspicuous place at least 30 minutes before the schedule time of arrival, a true statement of the extent of such delay. A failure to comply herewith is punishable by a fine of not over \$20; but if the company wilfully posts a false notice, the fine is \$100. The company is not liable for an erroneous statement, unless wilfully made. (Code, § 3941.)

§ 3. Separate coaches for white and colored persons on steam cars.—Separate cars or coaches for white and colored passengers must be provided; or a coach may be divided by a partition with door; and each coach or compartment shall bear in some conspicuous place words showing the race for which it is set apart. But no difference or discrimination must be made in the quality of service. A refusal or neglect to comply with the foregoing provisions is punishable by a fine of \$300 to \$1,000. (Code, § 3962-4.)

Conductors must assign passengers to their respective coaches or compartments, they being the judge of the race in case of their refusal to disclose; and if a passenger refuses to obey, he may be put off the train, without liability to himself or company for damages therefor. A conductor refusing or failing herein, is punishable by a fine of \$25 to \$50. (Code, § 3965-6.)

The legislature intended to exempt from the foregoing provisions, employees, nurses, officers in charge of prisoners or lunatics, white or colored, such prisoners or lunatics, and passengers in caboose cars, Pullman cars, and through or express trains doing no local business; but the references to the sections of the act are wrong. (Code, § 3968.)

When a coach or department is filled, and no extra coaches can be had, and the increased number of passengers could not be foreseen, the conductor may assign and set apart a portion of the car or compartment assigned to one race to passengers of the other race. (Code, § 3967.)

The circuit and corporation courts of the county or cities have jurisdiction of violations within their respective limits. (Code, 3969.)

The State Corporation Commission may require the establishment by transportation companies of separate wait-

ing rooms at all stations, wharves, or landings for the white and colored races. (Code, § 3716.)

§ 4. White and colored passengers to be separated on electric cars.—This is done by setting apart in each car or coach a portion thereof, or certain seats therein for the two races respectively. A refusal or neglect in this respect, is punishable by a fine of \$50 to \$250. But no difference or discrimination in the quality of service is allowed. The several apartments must be reasonably heated in cold weather. The conductor or other person in charge, when necessary or proper for the comfort or convenience of the passengers, may increase or decrease the amount of space for seats set apart for either race; but the two races must not sit beside each other, until all of the other seats in the car are occupied, and he may require passengers to change seats as often as necessary. For refusal or failure herein, he is fined \$5 to \$25, and may be ejected from the car and right of way of the company by the conductor, motorman, or manager of the company, or by a police officer or other conservator of the peace (and conductors and motormen are special policemen and may carry concealed weapons while on duty and while going to and returning from their work, and are the judge of the race of each passenger, where he has failed to disclose his or her race); and the ejected passenger is not entitled to return of any part of his fare, and the conductor, manager, motorman or company is not liable for any lawful act done in the enforcement of the foregoing provision. The foregoing provisions do not apply to employees, nurses, or officers in charge of prisoners or lunatics. (Code, §§ 3978-83.)

§ 5. Vestibule fronts for electric railways, when.—Electric railway companies must use vestibule fronts on their cars during November, December, January, February, March and April; but such fronts need not be used on open summer cars during November and April; and they need not close the sides of the vestibules. A refusal or failure herein is punishable by a fine of \$10 to \$100. (Code § 3977.)

§ 6. Passenger train not to be lighted with naphtha, etc.—See Code, § 3975.

§ 7. Abandonment, repair, and rebuilding railroad stations; waiting rooms and water closets.—The company cannot abandon a station which has been used for 5 consecutive

years, without the written consent of the State Corporation Commission, unless the station has been abandoned because of a change in the location of the railroad; and if a station is burned or otherwise destroyed or becomes unfit for the accommodation of the public, unless the same is rebuilt, repaired or renovated within a reasonable time, the Commission may require the company to do so within 90 days after notice to that effect. The company must provide a convenient and suitable waiting room and water closet or privies at all depots in cities and towns, and at such other stations as the commission may require, and keep and maintain the same in decent order and repair. (Code, § 3984.)

§ 8. When trains to stop before arrival at railroad crossing.—Whenever railroads cross each other on the same grade, the trains must be brought to a full stop at least 50 feet before getting to the crossing, except where the crossings are regulated by derailing switches, or other safety appliances, which prevent collisions at crossings, or where a flagman is stationed, or a signal tower is located and signals that the trains may cross in safety. (Code, § 3987.)

§ 9. Conductors, motormen, and agents conservators of the peace; concealed weapons.—Conductors of railroad trains and station or depot agents are conservators of the peace, and have the same power to make arrests that justices have, on board their respective trains and on the property of their company while on duty, or at their respective places of business. They may cause any person so arrested to be detained and delivered to the proper authorities for trial as soon as practicable. Motormen and conductors on electric cars have the powers of special police on their respective cars, and are authorized to carry concealed weapons while on duty, and while going to and returning from their work. (Code, § 3944.)

See also, section 4, above.

The general statute as to carrying concealed weapons provides that, among others, "a conservator of the peace" may carry a concealed weapon "while in the discharge of his official duty" (Code, § 4534), and this might be construed to include a conductor of a railroad train and a depot agent, who are "conservators of the peace."

§ 10. Baggage of passengers.—See *Baggage*.

§ 11. **Rules and regulations.**—Under the common law of Virginia, a common carrier has the right to make reasonable rules and regulations for the conduct of its affairs, which are binding upon passengers and the public dealing with the carrier when brought to their notice, provided they do not exempt the carrier from liability for negligence, or failure to comply with obligations or duties imposed by law. So the carrier may require payment of fare in advance, exact more money fare than for a ticket, and the like. (See general common law authorities.)

§ 12. **Tickets, transportation, and transfers.**—A ticket, if not expressly non-transferable, may be sold or transferred, if a carrier, sells a ticket at a reduced rate under agreement that it shall be forfeited if transferred, may take it up as forfeited when presented by another. A ticket stolen or fraudulently obtained from the carrier may also be taken up by the carrier, even though it be in the hands of an innocent purchaser. The redemption of an unused ticket cannot be demanded. Conditions printed on back of ticket do not bind the purchaser, unless he assents to them, or the ticket purports to be a mutual contract between the parties, when, if reasonable, it will bind him. A limitation as to the time within which a ticket is to be used, printed or stamped upon the face of the ticket, is binding. A stipulation in a mileage book that mileage must be detached by the conductor only, is binding as a reasonable regulation. A ticket between two points is good from any intermediate point to destination. A stop over is not allowed on a continuous ticket, unless so agreed. If a carrier sells a passenger a ticket to a particular station it has no right to refuse to stop its train there, and is liable for such refusal. If a passenger has a ticket to a station at which the train does not stop, he has the right to ride to an intermediate station at which it does stop, and if the conductor refuses to let him ride on such a ticket, the carrier is liable.

Carriers must give reasonable notice to passengers of change of cars or trains. Where transfer checks are required on street cars, the passenger must comply with the reasonable condition thereof. If a passenger is furnished with an improper transfer, the company is liable for his ejection. Carrying a passenger, without his consent, past his stopping

station or not giving him reasonable time to leave the train, makes the carrier liable in damages.

The carrier should stop the train at the usual platform for discharging passengers, and cannot require a passenger to alight at an unusual or unsuitable place. The passenger must be given reasonable opportunity and time to get on and off the train. The carrier is not required to awaken a passenger, but a general announcement of stations is all that is required. A carrier is liable for unreasonable delay in transportation, occasioned by the fault or negligence of its servants.

For refusing a passenger transportation or carrying him beyond his destination, he is entitled to recover for the breach of contract, damages for his trouble and inconvenience suffered, and expense and loss of time involved, but is not entitled to punitive damages, i. e., damages to punish the carrier, in excess of damages by way of compensation to the passenger. (Various decisions.)

§ 13. Ejection of passengers and intruders.—A passenger may be ejected from the train for refusing to comply with a reasonable rule or regulation of the carrier, as, where he is intoxicated, unruly, has a contagious disease, uses vulgar, indecent, or profane language, or is guilty of other disorderly conduct, or where he refuses to produce his ticket or pay his fare, or otherwise show his right to transportation. Where a parent refuses to pay the fare of a child, both may be ejected. Where a passenger tears the mileage from his mileage book contrary to the rule of the company and refuses to pay in any other way, he may be ejected without liability to the company. The company is liable for ejecting a person, who upon his offer to sign his name being declined, refuses to otherwise identify himself, where his ticket provides that he shall sign his name thereto or otherwise identify himself as the original purchaser. Payment or tender of fare to prevent expulsion, must be made before steps are taken, by ringing for the stoppage of the train or the like, to eject him.

A carrier is liable for ejecting a passenger without cause, or in an improper manner. Where a passenger is notified to leave a train, and he does so, it is an expulsion, even though no force is used. The carrier is liable for the damages resulting from an unlawful expulsion by its servants, even though

they act recklessly, wilfully, or maliciously, or in violation of their duty, if their acts are done in the discharge and within the general scope of their duties. The carrier is also liable for negligent expulsions, as, where the passenger is ejected from a moving train or car, causing injury to him, or at an improper time or place, or in an improper manner.

That the passenger was injured by reason of his helplessness due to intoxication or the like cause, if known to the servants of the carrier, does not excuse the carrier. Where the expulsion is proper, the carrier must use reasonable and ordinary care. Sufficient force may be used to effect the purpose, the amount depending upon the resistance offered. The carrier is liable for using unnecessary force or violence, and if the injury is wilful or malicious or with wantonness or gross negligence, the carrier is liable for punitive as well as actual damages—i. e., damages by way of punishment in addition to compensation.

A trespasser on a train must be given a reasonable opportunity to light without danger, and so may recover for injuries received through being forced to leave the train while in motion. (Various decisions.)

§ 14. Liability for personal injuries to passengers.—

(1) *Who are passengers.*—A person may be a passenger even before he purchases a ticket or enters the car. One becomes a passenger when he enters upon the premises of the carrier, with intention to take a train in due course; and possibly even the signaling a train at a flag station to stop. Where one enters the ticket office of a railway company to buy a ticket, he is entitled to the protection of a passenger, even though the agent refused to sell him a ticket; and a person intending to enter a street car which has stopped for passengers and who endeavors to enter the same while it is standing, is a passenger under the care of the street car company.

The relation of carrier and passenger does not terminate by the act of the passenger in alighting from the car at his destination, but continues until he has left the place where passengers are discharged, or a reasonable time has elapsed for the passenger to leave the railroad premises. A passenger does not cease to be such by alighting at a station other than his destination, for exercise, or for motives of curiosity, or to engage in a fight with an employee or car-

rier. Newsboys, postal clerks, mail agents, or express messengers, persons traveling on passes, or as free passengers, or in charge of live stock, are passengers. As to riding on freight trains, if the conductor has authority, express or implied, to grant a person permission to ride thereon, he becomes a passenger. But ordinarily the conductors have no such authority, and persons riding freight trains, pay cars, or hand cars, are not passengers. (Various decisions.)

(2) *Care required of carrier; for what negligence liable.*—A carrier of passengers (including a street car company), though not insurers of their safety, is bound to use the highest degree of care and diligence for their safety, not only in the management of its trains and cars, but also in the structure of its rolling stock, and the structure, repair, and care of its tracks and bridges, and all other arrangements necessary to the safety of passengers; and is liable for the slightest negligence on the part of itself or its servants which human care, skill, and foresight could have foreseen and provided against, for any defect in machinery, or for any negligence of its servants, but the negligence complained of must be the proximate cause of the injury sustained, i. e., it must be the direct and efficient cause of the injury. And where an injury happens to a passenger by the breaking down, over-turning or derailment of a railroad train, or the breaking down of a bridge, or wheel or axle, or by any other physical defect or derangement, the presumption is that it occurred by the negligence of the company, and the burden is in the company to show there has been no negligence and that the injury happened from some cause which human care and foresight could not prevent.

And the same rule as to care and negligence applies to sleeping or palace cars. The same also to stage coaches and other common carriers, other than railroad and transportation companies. Does the same rule also apply to passenger elevators?

A passenger on a freight train assumes the risks and inconveniences necessarily and reasonably incident to that mode of travel, but the degree of care required of the company to avoid damage to such passengers is the same as if he were traveling on a regular passenger train.

As to passengers at a station, on the platform, and one

boarding or alighting from a train and those assisting them, only reasonable or ordinary care is required of the carrier; and such care must be exercised in maintaining proper stations, platforms, and approaches. Passengers in infirm or disabled condition by reason of sickness, age or intoxication, if known to the carrier, throws upon it a greater degree of care for his safety. (Various decisions.)

(3) *Contributory negligence of passenger*.—A passenger is required to exercise ordinary care for his own safety; and so if the negligence of the passenger has so contributed to his injury, that but for his negligence or want of ordinary care and caution the injury would not have happened the company is not liable; and even though injury would not have happened but for the passenger's negligence, yet if the company after knowing of the plaintiff's negligence by the exercise of ordinary care and diligence on its part could have avoided the consequences of such negligence, the company is liable.

The following instances have been held, in Virginia, to be contributory negligence: protrusion of a limb from a car window, without the knowledge of the company; where a passenger on a freight train sits by the caboose door and falls out; where a passenger walking out on the station platform in the dark falls off; where a passenger passes from one coach to another in search of the conductor to get him to stop the train, and is thrown off; where a person encumbered with a cane and umbrella attempts to board a street car in motion, and lets loose the railing to catch his hat, and falls; where a person with a large valise in hand attempts to board a car while in motion; where a person undertakes to get off, or jumps off, a street car while in motion; where a person is struck by train while crossing the track to the platform. (Various decisions.)

(4) *Liability for assault on passenger*.—A carrier is liable for an assault upon a passenger committed by a servant within the scope of his employment, even though the assault is the result of personal malice. Carriers have thus been held for assaults made by conductors, brakemen, porters, members of a train crew, gatemen, station agents, etc.

A carrier must exercise great care and vigilance to protect a passenger from an assault by a fellow passenger, when such assault is reasonably apparent.

A carrier is also liable for an injury to a passenger by a third person, where the threatened injury was reasonably apparent, and it does not use proper means to avert it; but the carrier is not liable for the acts of third persons intruding into the waiting room or car, or upon the depot grounds, and causing injury to a passenger, where the injury could not have been reasonably anticipated. (Various decisions.)

(5) *Injury to passenger by independent contractor.*—

A carrier is not liable for the negligence of an independent contractor or of his servants, where due care has been exercised in selecting such contractor. An independent contractor is one who is skilled in the performance of a particular kind of work, and who, on account of his skill, is employed to do a piece of work, without restriction upon the means to be employed in doing the work, and who employs his own labor, which is subject alone to his control and direction, and undertakes to do the work either according to his own ideas, or in accordance with plans furnished by the person for whom the work is done. Nor is his character as independent contractor affected by the fact that his compensation is measured by so much per day to himself and those employed by him, nor that the owner furnishes the material for the work. (Various decisions.) But see section 20 of the workmen's compensation law, Acts 1918, p. 637.)

(6) *Liability of carrier for death of passenger.*— Where death is caused by the wrongful act, neglect, or default of any person or corporation, an action may be brought within one year, not exceeding \$10,000, and the court after payment of costs and recoverable attorney's fees, and the damages are distributed by the jury to the widow or husband and children and grandchildren; or if there be neither, then to the parents, brothers and sisters; but nothing shall be apportioned to the deferred class until the preferred class has been exhausted, but between members of the same class the jury has absolute discretion as to who shall receive the whole or any part of the recovery, and such damages are free from all debts and liabilities of the deceased; but if there be no such persons as above mentioned, the damages shall pass according to the statute of distributions (§5273). Where, however, there is a widowed mother and also a widow, but no child or grandchild, the amount is divided between the mother and the widow as the jury, or court may direct. The administrator or executor,

with the consent of the parties entitled to such damages, may compromise any claim for the same. If any of the persons are under age or other disability, the compromise may be made with the approval of the judge, in term or vacation, who directs the distribution in case the parties cannot agree, or are under disability (Code §§ 5787-90, and Acts 1920, p. 26, amending §§ 5787, 5790.) See *Death by Wrongful Act, etc.*

(7) *Carrier cannot contract against negligence.*—No agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own negligence or misconduct as a common carrier is valid. (Code, § 3930.) This act prohibits not only contracts exempting from liability, but also contracts limiting liability; and applies to free passengers as well as to those that pay.

For liability of common carrier by railroad engaged in commerce in the State, for injury or death, through negligence, of an employer, see *Employer and Employee*, div. I., section 4.

COMPOUNDING OR CONCEALING CRIMES

- § 1. Concealing or compounding offenses; how punished
- § 2. Compromise of certain misdemeanors
- § 3. Form of "description" in warrants or indictment

§ 1. Concealing or compounding offenses; how punished.—"If any person, knowing of the commission of an offense, take any money or reward, or an engagement therefor, upon an agreement or understanding, expressed or implied, to compound or conceal such offense, or not to prosecute therefor, or not to give evidence thereof, he shall, if such offense be felony, be confined in jail not more than one year, and fined not exceeding \$500; and if such offense be not a felony, unless it be punishable merely by forfeiture to him, he shall be confined in jail not exceeding six months, and fined not exceeding \$100." (Code, § 4513.) Composing a crime was a misdemeanor at common law.

§ 2. Compromise of certain misdemeanors.—See *Justice of the Peace*, div. VI. (as to "Trial of Misdemeanor"), section 10.

§ 3. Form of "description" in warrant or indictment.—

No. 1. COMPOUNDING A FELONY OR MISDEMEANOR (Code, §§ 4513, 4849.)

DESCRIPTION:

"well knowing that E. F., on the — day of —, 192—, in said county [here insert 'description' of the offense committed by E. F., concluding it 'against the peace and dignity and Commonwealth of Virginia'], did then and there unlawfully and unjustly, regardless of public justice and for the sake of private gain, take and receive from said E. F., — dollars (or other reward or an engagement therefor), upon an agreement and understanding that the said C. D., would compound and conceal the said offense, so committed by the said E. F., as aforesaid, and that he the said C. D., would not prosecute the said E. F., or give evidence against him for the said offense."

No. 2. EXTORTION BY SHERIFF (Code § 4514.)

DESCRIPTION:

"then being the sheriff for said county, did, for levying a writ of *scire facias* in behalf of the said A. B. upon the goods and chattels of E. F., knowingly and extorsively demand and receive of the said A. B., as a fee for the said service, one dollar (or other sum), which sum is more than the fee allowed and provided by law for the service aforesaid."

No. 3. A PERSON NOT AN OFFICER, STEALING, SECRETING, OR DESTROYING A PUBLIC RECORD. (Code, § 4578.)

DESCRIPTION:

"did unlawfully steal (or *fraudulently secrete or destroy*) a certain public record, to-wit: the public record of the orders and judgments (or other records) of the county court for said county entered in Order Book No. —, of the said court."

COMPROMISE

See Burks' Pleading and Practice" (new ed.), *Title Accord and Satisfaction*

- § 1. Definition
- § 2. Value and kind of satisfaction required
- § 3. Compromise with one joint contractor or co-obligor
- § 4. Compromises for minors, lunatics, etc

- § 5. Compromises by administrator, executor, guardians, committee, trustee, etc
- § 6. Compromise in case of death by wrongful act
- § 7. Compromise and attorney's lien
- § 8. Compromise of violations of fishery and oyster laws
- § 9. Compromising crimes
 - (1) Concealing or compromising crimes; punishment
 - (2) Compromise of certain misdemeanors

§ 1. **Definition.**—A compromise, technically called “accord and satisfaction,” is where parties having a controversy mutually agree, the one to make or give, and the other to receive, something (money, property, or act done) in satisfaction of the matter in controversy. (4 Min Inst. 166.)

§ 2. **Value and kind of satisfaction required.**—It must be something certain, and definite, and legal, and a reasonable and good satisfaction. At common law part payment was not sufficient. (4 Min. Inst. 167.) By section 5765 of the Code:

“Part performance of an obligation, promise or undertaking, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise, or undertaking.”

This section was never intended to enable a debtor to perpetrate a wrong and injustice upon his creditor by taking advantage of his pressing need of money; so where the amount accepted under protest and aggravated circumstances of constraint, it may be held there was no meeting of the minds of the parties, and consequently no compromise (116 Va. 233).

The burden of proof is on the debtor to bring himself within the section (102 Va. 568).

§ 3. **Compromise with one joint contractor or co-obligor.**—By section 5763 of the Code: “A creditor may compound or compromise with any joint contractor or co-obligor, and release him from all liability on his contract or obligation, without impairing the contract or obligation as to the other joint contractors or co-obligors.”

And by section 5764: “When said compounding or compromise is made, the contract or obligation shall be credited with a full share of the party released, except where the compounding or compromise is with a surety or co-surety, and

in that case, as between the creditor and principal, the credit shall be for the sum actually paid by the compounding debtor."

But the above sections shall not affect or impair the right of contribution between joint contractors or co-obligors (Code, § 5766.)

§ 4. Compromises for minors, lunatics, etc.—By section 5332 of the Code: "In any action or suit wherein an infant, idiot or lunatic is a party, the court in which the same is pending shall have the power to approve and confirm a compromise of the matters in controversy on behalf of such infant, idiot or lunatic, if said compromise shall be deemed to be to the interest of the infant, idiot or lunatic; and any order or decree approving and confirming any such compromise shall be binding upon such infant, idiot, or lunatic except that the same may be set aside for fraud; and any such infant shall not be allowed to attack and set aside any such order or decree, unless he shall proceed so to do within six months after coming of age."

§ 5. Compromises by administrator, executor, guardian, committee, trustee, etc.—They, or any one standing in a fiduciary or confidential relation to another, may compromise any liability due to or from them, if approved by the court, all parties being before it. And in a suit against a joint stock company for the payment of its debts and administering its assets, a trustee or mortgage, or a receiver, may, with the sanction of the court, compromise any claim or demand or controversy, and give receipts or bonds, notes, etc.; but such compromise is not valid until there is filed in said court the consent in writing of the majority in number and value of the creditors of the company, whose claims, under a general order of courts for proof of debts, have been reported by a commissioner and approved by the court. Such compromise shall not impair the liability of any other person arising out of the same contract, except when the contract or liability is joint the amount received shall be credited in full of the share of the party released. But nothing above shall affect the right of indemnity or of contribution among the parties. (Code § 5440.)

And any administrator, executor, guardian, committee of a lunatic, or trustee may submit a suit or controversy to arbitration (Code § 6163)—see *Arbitration*, section 5.

§ 6. Compromise in case of death by wrongful act.—See *Death by Wrongful Act, etc.*, section 1.

§ 7. Compromise and attorney's lien.—See *Attorney and Client*, section 11.

§ 8. Compromise of violations of fishery and oyster laws.—For compromise of fishery cases, see Code, § 3156; of oyster cases, §§ 3264, 3288.

§ 9. Compromising crimes.—

(1) *Concealing or compromising crimes; punishment.*—See *Compounding or Concealing Crimes*.

(2) *Compromise of certain misdemeanors.*—See *Justice of the Peace*, div. VI. (as to "Trial of Misdemeanors"), section 10.

COMMON LAW

See *Statutes*

§ 1. Definition

§ 2. The common law made the law of Virginia

§ 3. No customary law originating in Virginia

§ 1. Definition.—By common law we mean that great body of the unwritten law of our mother country, made up of those principles and general customs, founded on the law of nature and of common sense and right, which have been in use in England for hundreds of years, even from beyond the historic memory of man—or, as stated by Blackstone, "from a time whereof the memory of man runneth not to the country,"—and which have been handed down by tradition or word of mouth from generation to generation, and gradually evidenced and embodied and made more certain and fixed by the decisions of courts and by text-books and books of practice, as witness the thousands of volumes—in Virginia alone over 130 volumes of decisions construing, setting, stating, and re-affirming common law rules and principles for the most part. (See 1 Min. Inst. 34 to 39.) If the common law be too doubtful it is usually made clear by a declaratory statute—see *Statutes*, section 3.

§ 2. The common law made the law of Virginia.—By

section 2 of the Code of Virginia: "The common law of England, so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly"; and by section 3: "The rights and benefit of all writs, remedial and judicial, given by any statute or act of Parliament made in aid of the common law prior to the fourth year of the reign of James the First (1607), of a general nature, not local to England, shall still be saved, so far as the same may consist with the Bill of Rights and Constitution of this State and the Acts of Assembly."

The common law is not thus adopted in all respects; but such of the doctrines and principles of common law as are repugnant to the nature and character of our political system, or which the different and varied circumstances of our country render inapplicable to us, either are not in force or must be so modified in their application as to adopt them to our condition. It is a substantial compliance with the common law rather than a literal one which is required by this section (96 Va. 310; 82 Va. 15; 1 Hen. and Munf. 161-2; 1 Wash. 83; note to § 2, Code, 1919).

Where a statute changing the common law is repealed, the common law is restored to its former state (16 Grat. 363; 76 Va. 419; 82 Va. 312).

§ 3. No customary law originating in Virginia.—While the general immemorial customs of England are made the law of Virginia, yet no customs originating in Virginia can be law as part of the common law for such customs originated since 1607, within the historic memory of man, and so are not a part of the common law which our ancestors brought with them when they came over in 1607. But this doctrine does not exclude the effect of usage or custom in proving or modifying contracts, either express or implied; for contracts are generally made with more or less reference to existing custom or usage, and, although where the agreement is in writing, it may not be altered by proof of any such custom, save where the terms of the writing are ambiguous, yet having due regard to that rule of evidence used and custom are powerful helps to the meaning of the parties. (1 Min. Inst. 38, 39).

CONDITIONAL SALE, OR RESERVATION TITLE OR LIEN

See Conditions in Conveyances and Wills

- § 1. How title or lien reserved
- § 2. How such contract enforced
- § 3. How such contract marked satisfied; landlord's lien
- § 4. Forms under "Conditional Sale, or Reservation Title or Lien"

§ 1. How title or lien reserved.—A very common form of sale by merchants, furniture dealers, and others is, where the title or a lien is reserved until the goods are paid for, or the title is made to depend on some condition, the possession in either case being delivered to the vendee or purchaser. In such a case, the reservation or condition is void as to creditors of the vendee who acquire a lien upon the goods, and purchasers from the vendee for value, without notice unless such sale or contract be in writing signed by both parties, and a memorandum thereof, setting forth the name of the vendor and the vendee, the date, amount due, when, and how payable, and a brief description of the goods; "provided, that if such filing for docketing be done within five days from the delivery of the goods and chattels to the vendee, it shall be as valid as to creditors and purchasers as if such filing for docketing had been done on the day of such delivery of the goods and chattels;" and it shall be the duty of the clerk to docket the contract and endorse thereon "Memorandum docketed," signing his name, for which he charges a fee of 25 cents, or not over 50 cents in case of railroads. (Code, § 5189, as amended by Acts 1922.)

Prior to this statute, a conditional sale did not have to be recorded so as to be good against creditors and subsequent purchasers; it was binding as against them even though they had no notice of it.

A "purchaser" here is not only on who has bought but one who has obtained a lien by contract, as, a deed of trust, a reservation lien, crop lien, and the like. A "creditor" is not one in the popular sense, but one having a lien imposed by law, as, a judgment, execution, attachment, recognizance, forfeited forthcoming bond, and the like. (1 M's Real Prop., §§ 1171-2, 1404, 1406.)

No acknowledgment of such contract is required

§ 2. How such contract enforced.—Such contract, whether docketed or not, may be enforced by a petition before a justice, if the amount or value involved is \$300 or under; otherwise by bill in a court of equity, stating the contract and the plaintiff's claim and describing the property with reasonable certainty. All persons whose rights will be affected thereby must be made defendants. The testimony, even in court, is given orally. The property may be sold, or possession delivered, or other disposition made as the justice or court may direct; and, in a proper case, a personal judgment may be rendered against one or more of the defendants. Pending the litigation, the possession of the property is determined as in detinue; except the affidavit in section 5797 of the Code should state that the affiant (the one making it) verily believes the plaintiff is entitled to receive the property, or to subject it to a lien for the purchase price thereof, as the case may be. (Code, § 5190.)

§ 3. How such contract marked satisfied; landlord's lien.—When the purchase price is paid in full, the vendor or seller, or his agent or attorney, must mark, on the margin of the book, the contract satisfied, and sign his name thereto, attested by the clerk. The vendee or purchaser pays the clerk a fee of 25 cents. A vendor or seller failing to mark the record, after 15 days' notice from the vendee or purchaser, shall forfeit to the latter \$5. Where the purchaser owes rent on the house where the goods are, and the landlord or his duly authorized agent has taken action to recover same, the seller, at the request of the landlord or his duly authorized agent or attorney, must state on oath the balance due on such contract, and upon payment of such balance, must mark the contract satisfied, and for failure so to do shall forfeit \$5.00 to the party making such payment. (Code, § 5191.)

§ 4. Forms under "Conditional Sale or Reservation Title or lien."—

NO. 1. CONDITIONAL SALE OR RESERVATION OF TITLE AND LIEN OF PERSONALTY

(Code 5189, as amended by Acts 1922.)

This agreement, made this the— day of —, 192—, between A. B., of the one part, and C. D., of the other part, all of the county of—, and the State of Virginia

Witnesseth: That the said A. B., for the consideration of \$—,

of which \$—— is paid cash in hand, the receipt whereof is hereby acknowledged, and the residue of \$——, to be paid as follows: [state the several installments and when to be paid], the said A. B. doth bargain and sell unto the said C. D., with the reservations and upon the conditions hereinafter mentioned, the following goods and chattels [here name them]. But it is expressly understood and agreed between the parties hereto, that the title to the said goods and chattels, and a lien thereon are reserved, until the same have been fully paid for by the vendee as above stipulated; and if default shall be made in either of said payments, or if the vendee shall sell or offer to sell the said goods and chattels or any of them or remove or attempt to remove the same from the county (or town or *his present place of residence at*——, as may be agreed) without the written consent of the said A. B., or shall improperly use or injure the same [state any other conditions that may be agreed on] then the said A. B., or his agents, may resume actual possession thereof, and for this purpose he or his agents may lawfully enter the curtilage, dwelling, and premises, wherever the said goods and chattels may be, and take and carry the same away; and the said vendee doth hereby waive any action for trespass or damage therefor and disclaim any right of resistance thereto. It is likewise expressly understood and agreed between the parties hereto, that in case the right to the possession of the said goods and chattels is forfeited as aforesaid, any sums of money paid by the vendee on the same, shall be retained by the vendor, as a reasonable rent for the use of the same, and for any annoyance, trouble, or expense incurred by the vendor by virtue of the default or conduct of the vendee in the premises. The said vendee doth hereby waive the benefit of his homestead exemption as to this obligation.

Witness the following signatures and seals.

A. B. (SEAL.)

C. D. (SEAL.)

No. 2. CONDITIONAL SALE WITH DEED OF TRUST ON OTHER PROPERTY
(Code, § 5189, as amended by Acts 1922.)

Follow No. 1, above, and add a deed of trust clause, just before the homestead waiver, as follows:

"And further to secure the said purchase price, the said C. D. doth grant and convey unto T. T., trustee, the following property, viz: [here describe it with reasonable certainty]."

In such case, if you desire it to be good against other purchasers and creditors, the writing should be acknowledged, and docketed as to the property sold, and recorded as to the other property in the Deed of Trust Book, for a deed of trust should be recorded in extenso (in full) to give notice to others. The deed of trust part of the contract is enforced by the trustee's advertising and selling as in other cases of deeds of trusts. The reservation lien or title is enforced as per forms Nos. 3 to 7, below.

No. 3. CONDITIONAL SALE, ETC., OF FURNITURE

(Idem.)

This agreement made this the — day of —, 192—, between A. B., furniture dealer at Pulaski, Va., of the one part, and C. D., residing in said town, of the other part.

Witnesseth: That the said A. B. doth bargain and sell unto the said C. D., with the reservations and upon the conditions hereinafter mentioned, the following furniture and furnishing goods, at the prices affixed to each piece or article, viz: [here name them], the whole aggregating the sum of \$—, which is to be paid as follows: \$—, cash in hand, receipt whereof is hereby acknowledged, and the residue of \$—, as follows: [here state the installments and when to be paid]. But it is expressly understood and agreed between the parties hereto, that title to the said furniture and goods and a lien thereon are reserved unto the said vendor, A. B., until the same shall have been fully paid for by the said vendee, C. D., as above stipulated; and if default shall be made in either of said payments the said vendee shall sell or offer to sell the said furniture and goods, or any of them, or remove or attempt to remove the same from his present residence on — street or avenue, in said town without the written consent of the said A. B., or shall improperly use or injure the same, then the said A. B., or his agents, may enforce his reservation of title and lien under the statute in such case made and provided, or may resume actual possession thereof, and for this purpose he or his agents may lawfully enter the curtilage, dwelling, and premises wherever the said furniture and goods may be, and take and carry the same away; and the said vendee doth hereby waive any action for trespass or damages therefor and disclaim any right of resistance thereto. It is likewise expressly understood and agreed between the parties hereto, that in case the right to the possession of said furniture and goods is forfeited as aforesaid, any sums of money paid by the vendee on the same, shall be retained by the vendor as a reasonable rent for the use of the said furniture and goods for any annoyance, trouble, or expense incurred by the vendor by virtue of the default or conduct of the vendee in the premises. The said vendee doth hereby waive the benefit of his homestead exemption as to this obligation.

Witness the following signatures and seals.

A. B. (SEAL.)

C. D. (SEAL.)

No. 4. PETITION FOR ENFORCEMENT OF CONDITIONAL CONTRACT

(Code, § 5190.)

To Honorable J. T., a justice of the peace of — county [or "R. C., judge of the circuit (or corporation) court of said county (or corporation)"]:

The petition of A. B. shows unto your worship (or honor) that by virtue of his contract of sale, in writing, with one C. D., bearing date on the — day of —, 192—, which contract is filed here-

with as a part of this petition, he sold to the said C. D., certain goods and chattels, as follows: [here describe the property with reasonable certainty], for the sum of \$—, of which \$— was paid cash in hand, and the residue of \$— was to have been paid as follows: [here state the installments and when to be paid]; that in the said contract of sale, the said A. B., expressly reserved title to the said goods and chattels, and a lien thereon, until the purchase price should be fully paid; that it was expressly stipulated in the said contract, among other things, that in case of default in any of the said payments (or other failure of condition, as the case may be), the said A. B. might enforce his reservation of title to and lien on the said goods and chattels.

Your petitioner alleges that the said C. D., has failed to pay the said installments of the purchase price of said goods and chattels, and is now in default in the payment of same (or allege some other default, as the case may be); and the amount or value involved being \$—, which is an amount or value within the jurisdiction of your court [\$300 or under, in case of a Justice] your petitioner prays that the said C. D., (and all other persons whose rights may be affected by the proceeding) shall answer the said petition, according to law.

Respectfully,

A. B.

No. 5. WARRANT BY A JUSTICE TO ANSWER PETITION FOR ENFORCEMENT OF CONDITIONAL CONTRACT

(*Idem.*)

Virginia, — county, to-wit:

To X. Y., constable (or *sheriff*) of said county.

You are hereby commanded to summon C. D., if to be found in your county, to appear at —, in said county, on — day of —, 192—, at — a. m. (or *p. m.*), before me or such other justice of said county as may then be there to try this warrant, to answer the petition of A. B., for the enforcement of a certain contract or writing executed by the said A. B., and C. D., on the — day of —, 192—, for the sale of certain property therein mentioned; and then and there make return of this warrant. Given under my hand, this — day of —, 192—.

J. T., J. P.

No. 6. JUDGMENT OF JUSTICE DIRECTING SALE

(*Idem.*)

Upon the hearing of the within warrant, this day, judgment is rendered in favor of the within named A. B., against the within named C. D., for the sum of \$—, and \$— costs; and X. Y., a constable (or the *sheriff*) of — county, is hereby commanded and

required, in the name of the Commonwealth, to take the said property, and, after advertising the time, place, and terms of sale according to law (as in the case of executions), proceed to sell the same by public auction to the highest bidder for cash, and, after having paid and satisfied the said judgment and all costs, pay over any surplus that may be left to the said C. D.

Given under my hand, this — day of —, 192—.

J. T., J. P.

Where the property is restored to vendor, say: "Upon the hearing of the within warrant, this day, judgment is rendered against the within named C. D., for the property in the within petition mentioned, and \$— costs, and X. Y., a constable (or *the sheriff*) of — county is hereby commanded and required to cause A. B., to have possession of the said property."

"When the judgment is for money or costs or for the specific property, execution may issue therefor as in other cases," says the statute; so, if desired, an execution may issue; or a writ of possession, and an execution for damages or costs, as in case of detinue.

NO. 7. MARKING OF SATISFACTION OF CONTRACT BY SELLER

(Code, 5191.)

The amount of the purchase price set forth in this contract having been paid in full, the same is hereby marked satisfied and released. This — day of —, 192—.

A. B. (or A. A. Agent or Attorney for S. S.)

Tests:

C. C., Clerk.

CONDITIONS IN CONVEYANCES AND WILLS

- § 1. What is a "condition" in a deed, will, etc.
- § 2. "Condition precedent" and "condition subsequent" defined
- § 3. Condition subsequent distinguished from common law and conditional limitations
- § 4. Illegal conditions
- § 5. Repugnant conditions
 - (1) Conditions in restraint of conveyance
 - (2) Conditions that land granted shall not be liable to grantee's debts
 - (3) Conditions restricting use of premises granted
- § 6. Performance of conditions
- § 7. Relief in equity against forfeiture for breach of condition

§ 1. **What is a "condition" in a deed, will, etc.**—It is a restriction annexed to an estate, in a deed, will, or other conveyance, whereby upon the happening of a same event, the estate arises, is created, or takes effect, or is defeated. Conditions may be annexed to estate of every quantity or duration, whether in fee simple, for life, or for years—see *Real Estate*, section 2.

A condition may be created by such words as "on condition," "provided that," "so that," etc., or other less direct phrase. (1 M's. Real Prop., §§ 525, 529.)

§ 2. **"Condition precedent" and condition subsequent defined.**—Where on the happening of the event, the estate arises, the condition is called "condition precedent," i. e., precedent to the creation of the estate; where, defeated, the condition is "condition subsequent," i. e., subsequent to the arising of the estate; the former to be construed liberally, while the latter, strictly. (1 M's. Real Prop., §§ 525, 528.)

§ 3. **Condition subsequent distinguished from common law and conditional limitations.**—A "common law limitation," sometimes called a "condition in law" or a "special limitation," is where an estate is limited to one until a certain event happens, or while a certain state of things continues, or during an intermediate period, they being created by such words as "until," "while," "as long as," etc.; as a grant to A until Z returns from abroad; to a woman while she remains single, etc. These mark the utmost time of continuance of an estate; while a condition subsequent marks some event, which, if it happens in the course of that time, is to defeat the estate, as, a grant to Z for life, provided that, if W marries, Z's estate should cease.

A "conditional limitation" is a future estate of freehold vested in one person, but so limited that it may shift over to another person immediately upon the happening of some event, without awaiting the expiration of the first estate, and can arise only by virtue of our statutes (Code, §§ 5147, 5155, 5227, 5464, 5530) dispensing with common law formalities of conveyances and re-entry; while an estate upon condition subsequent, though like the other terminating prematurely, yet does not go over to another but returns to the grantor, etc., upon his re-entry. A conditional limitation is like both a condition subsequent and a remainder, as, a will, or grant, etc., to A

and his heirs, but if A dies without having married W, then to Z in fee. (1 M's. Real Prop., §§ 540-3.)

§ 4. Illegal conditions.—Conditions are illegal if immoral, or in restraint of trade or of marriage (except as to widows). Where the condition is illegal, if it be precedent, the estate does not vest, and if it be subsequent, the condition is void and the estate remains unimpaired, even though in either case, the condition were performed.

A will to "A until she marries and then to Z," is a conditional limitation, and good; but where the will is to "A for life, on condition that if she marries, then to Z," the condition is illegal and void. As to legacies given over to another upon marriage, the condition, whether precedent or subsequent, must be complied with, unless it be unreasonably restrictive of marriage, when it is wholly void, and the legacy passes, otherwise the condition must be absorbed if the legacy is not given over upon marriage, and the condition is precedent and unreasonably restrictive of marriage, the same is true; if the condition is subsequent, it does not defeat the legacy, whether the condition is unreasonably restrictive or not. (1 M's. Real Prop., §§ 566-77.)

§ 5. Repugnant conditions.—Conditions are repugnant and therefore void, when they are inconsistent with the legal nature and incidents of the estate granted, to which they are annexed; as, (1) not to convey the estate; (2) that it shall not be subject to the grantee's debts; and (3) not to use it in particular ways or for particular purposes.

(1) *Conditions in restraint of conveyance.*—These, when annexed to a conveyance of a fee simple, are void; except, (a) where the restriction is reasonable as to time or confined to a few designated persons, but otherwise where the restriction is as to all except a certain class of persons not constituting a very large proportion of the community, or is as to a particular method of transfer, as by will or mortgage or deed, or as to the grantee's becoming a bankrupt or as to the land's being sold under order of court upon a judgment against him; (b) where the property is a married woman's equitable separate estate; (c) where the grantee is a corporation, or the conveyance is for a church, school house, city hall, public square, or the like; (d) where the condition is annexed to another tract; (e) where the condition (or a covenant—92 Va. 292) not to

convey land is annexed to a bond; or (f) where the restriction is in the form of a common law limitation, (see section 3, above), as, to A until he conveys."

When the condition is annexed to an estate for life or for years, a condition restrictive of transfer is always to be regarded as against public policy, and for that reason to be strictly construed, and when not needful to protect the reversion or remainder, it is in general void. As to covenants not to assign or sub-lease, see *Landlord and Tenant*, section 5, (6). (1 M's Real Prop., §§ 578-88.)

(2) *Conditions that land granted shall not be liable to grantee's debt.*—In general, such a condition is void; but otherwise as to a common law limitation (see section 3, above), as, where the grant (of legal or equitable estate) is to A until he becomes a bankrupt and then over, or until he commits an act of bankruptcy, and then over, also a condition in a lease for years that the lease shall end, upon an act of bankruptcy by the tenant, or upon the term's being taken in execution, is valid, although it could not be screened by condition from his debts while it continued his property. (1 M's. Real Prop., §§ 589.)

(3) *Conditions restricting use of premises granted.*—If in a reasonable manner, they are valid; as, where the property is forbidden to be used for a particular business, such as the sale of liquor, or is required to be used or improved in a particular way, as by the erection of a dwelling at a minimum cost of so much or the like. Unreasonable restrictions (by condition) of a fee simple estate is void, as, that the grantee shall not take the profits of the land, or that he shall lease it at a named rent, or that he shall lease it at all, or that he shall cultivate it in a certain manner, or that no window shall be placed in a house. (1 M's Real Prop., § 590.)

§ 6. Performance of conditions.—The person taking possession takes subject to and must perform the conditions, and is bound personally; his assignees, however, are liable only to the extent of the value of the property. In general, any one having an interest in the condition or land may perform the condition; a stranger cannot, except for a minor or idiot or where it is accepted and ratified by the parties.

If the condition is conjunctive (several with "and" between the parts) all the parts (possible of performance) must

be performed; if disjunctive (with "or" between the parts), the performance of either is sufficient.

The performance must be at or before the day named; if no day named, it must be during his life at least, and within a reasonable time where the justice of the case requires, as, where the condition is payment of money, delivery of a deed, or the like.

Performance will be excused.—(1) where the other party is absent at the proper time and place, when his presence is needful; (2) where performance is tendered and refused; and (3) where the other party omits the previous notice, request, or other prior act.

The performance may be expressly waived by the other party, but if the condition be in a deed, the waiver must be by writing under seal, unless, indeed, the grantor by his silence and verbal acquiescence has induced the grantee to expend money on the property, when the grantor will be estopped to enforce the condition. In any case, a waiver may be implied, where the conduct of the other party is such as cannot be reconciled with a purpose to insist upon the condition; but a waiver is never implied from mere indulgence or silence. As to conditions to do or not to do a single act at or by a certain time, or at a certain place, a license or privilege once given for the breach of a condition discharges it forever; but otherwise as to conditions of a continuing and recurrent character, is to pay rent the first of each month, the landlord's excusing one payment does not excuse the whole series.

A grantor, with knowledge of a breach of condition, who does any act (as, the acceptance of rent) clearly recognizing the grantee's interest as still subsisting, thereby waives his right of re-entry or the forfeiture of the condition; as to previous, but not as to subsequent breaches.

As to impossible conditions, if the condition is precedent, of course no estate can vest; if subsequent, performance is excused if the condition is impossible at the time, or if possible at the time, is subsequently made impossible by the act of God (as, death) or by the act of the other party. Of course, if the condition is made impossible by the act of the performer, the estate is defeated. (1 M's Real Prop. §§ 544-65.)

§ 7. Relief in equity against forfeiture for breach of condition.—In case of a condition to pay money, equity will

always relieve within a reasonable time after default, upon payment of principal and interest; if the condition is a penalty equity will relieve (though party cannot elect to pay penalty and so evade specific execution of contract; but equity will not relieve if payment of part (as, interest) is to be remitted if the condition is fulfilled. A condition, in a deed of trust to secure, a debt payable several years hence, that if any annual interest be not punctually paid, the whole debt shall immediately become payable, and the deed of trust enforced as to all, is not a penalty, and is valid (93 Va. 380).

As to conditions to do some other thing than the payment of money, equity will not interpose, where the other party cannot be put into a plight essentially the same or as good; as, where the breach is assigning the premises without leave, neglecting to repair, failure to insure, farming in a prohibited way, exercising a forbidden trade on the premises, and the like.

If the condition is to pay a stipulated or fixed measure of damages, if actually estimated in good faith, equity will not interfere. It is not enough merely to call them "liquidated damages," if the contrary appears. (1 M's Real Prop., §§ 591-4.) See *Penalty*.

CONFESSION OF JUDGMENT

See *Judgment Lien*

§ 1. Where and how made

§ 2. Form of power of attorney to confess judgment

§ 1. Where and how made.—A debtor may confess judgment in the clerk's office in vacation before the clerk (Code, § 6130); and this may be done though no suit be pending or process issued (31 Grat. 580, 599; 32 Grat. 707; 90 Va. 647; 112 Va. 384; 4 Min. Inst. 728); yet a memorandum for the suit is usually made and process issued and service accepted. The confession may be made in person, or by an attorney in fact under a power of attorney.

It may be done even though the case be on the court docket. (Burk's Pl. & Pr., §§ 181, 188.)

"A judgment on confession shall be equal to a release on errors." (Code, § 6330.)

§ 2. Form of power of attorney to confess judgment.—See under *Power of Attorney*, No. 2; and under *Promissory and Negotiable Notes*, No. 5.

§ 3. Act 1922 regulating the confession of judgments in the clerk's office; procedure.—(1) *When judgment may be confessed; lien.*—"Any person being indebted to another person, may, at any time confess judgment in the clerk's office of any court of record in this Commonwealth, whether a suit, motion or action be pending therefor or not, for so much principal and interest as his creditor may be willing to accept a judgment for, which judgment, when so confessed, shall be forthwith entered of record by the clerk in whose office it is confessed, in the proper order book of his court, and shall be as final and as binding as though confessed in open court or rendered by the court, subject to the control of the court in which rendered, and may be set aside only for fraud or other like taint.

The clerk shall enter on the margin of the record of such judgment, the day and hour when the same were confessed and the lien thereof shall attach and be binding from the time of such confession so entered."

(2) *How confession made.*—"Such confession of judgment may be made either by the debtor himself, or by his duly constituted attorney in fact acting under and by virtue of a warrant duly executed and acknowledged by him as deeds are required to be acknowledged, before any officer or person authorized to take acknowledgments of writings to be recorded in Virginia, and of the following tenor, to-wit:

"To the clerk of the _____ court of the _____ of _____, in the Commonwealth of Virginia, greeting:

I, A. B. (or *A. B. and C. D.*, etc.,) hereby acknowledge my self (or *ourselves*) to be justly indebted to (name of creditor) in the sum of _____dollars and _____cents (\$_____) with interest thereon from the _____day of _____, 10____, as to which obligation I (or *we*) hereby waive the benefit of my (or *our*) homestead exemptions; and be it known to you, that I (or *we*) do hereby constitute and appoint (name of attorney in fact) my (or *our*) true

and lawful attorney in fact for the purpose, and I (or *we*) do hereby vest him with full power and authority to personally appear for me (or *us*) and confess judgment before you in your office against me (or *us*) in favor of the aforesaid (name of creditor) for the said sum of \$_____, with interest thereon from the said _____ day of _____, 192—, until paid, and the costs of this proceeding, with waiver of homestead exemptions as aforesaid.

Given under my (or *our*) hand— and seal—, this _____ day of _____, 192—.

A. B. (or A. B. and C. D.) (Seal)

Add a certificate of acknowledgment.

On the presentation of such warrant by the person therein named as attorney in fact, or upon the personal appearance of the debtor or debtors and the expression by him or them of his or their desire to confess such judgment, the clerk shall draw and require the said attorney in fact, or the debtor or debtors, the case may be, to sign a confession of judgment, which shall be in form, as follows:

Virginia: In the clerk's office of the _____ court of _____, to-wit:

I (or *we*), A. B. (or *A. B. and C. D. etc.*), hereby acknowledge myself (or *ourselves*) to be justly indebted to, and do hereby confess judgment in favor of (name of creditor) in the sum of _____dollars and _____cents (\$_____) with interest thereon from _____ day of _____, 192—, until paid, and the costs of this proceeding, hereby waiving the benefit of my (or *our*) homestead exemptions as to the same.

Given under my (or *our*) hand— and seal—, this _____ day of _____, 192—.

A. B. (or A. B. and C. D.) (Seal)

Or, if by an attorney in fact after signatures and seals of creditors, add:
by A. T., his (or *their*) attorney in fact.

When a judgment is so confessed, the clerk shall endorse upon such confession, or attach thereto, his certificate in manner and form following, to-wit:

Virginia: In the clerk's office of the _____ court of the _____ of _____, the _____ day of _____, 192—.

The foregoing (or *attached*) judgment was duly confessed 192—, at ———o'clock———M., and has been duly entered of before me in my said office on the———day of ———, record in common law order book number ———, page ———

Teste:———C. C. Clerk.

The said confession and clerk's certificate, together with the warrant, if the confession be by attorney in fact, shall be securely attached together by the clerk and filed by him among the records of his office.

The clerk shall forthwith docket such judgment in the current judgment lien docket in his office, and shall issue execution thereon as he may be directed by the creditor therein, or his assigns, in the manner prescribed by law."

(3) *Fees upon confession of judgment.*—"The following fees, and no other, shall be taxed by the clerk as and for the costs of such proceeding:

The statutory writ tax	_____	\$ _____
For the attorney in fact, when there is one	_____	2.50
For the clerk for drawing confession of judgment	_____	.50
For the clerk for certificate as to confession	_____	.25
For the clerk for entering judgment on order book	_____	.50
For the clerk for noting date of confession on margin of order book	_____	.25
For the clerk for filing all papers	_____	.50
For the clerk for docketing the judgment and issuing execution, the same fees allowed by law for docketing judgments rendered in court and issuing executions thereon."		

CONSPIRACY

See *Adultery, Fornication, etc.; Anti-Trust Law; and Strikes*

- § 1. Definition and punishment of conspiracy
- § 2. The several constituents of conspiracy
- § 3. Instances of conspiracies enumerated
- § 4. Form of "description" under warrant or indictment

§ 1. Definition and punishment of conspiracy.—Conspiracy is a misdemeanor at common law, and punishable by statute (§ 4782) by a fine not over \$500, or jail, not over 12

months, or both. Conspiracy is defined to be an agreement between two or more persons by some concerted action to commit an offense; or falsely to accuse or prosecute another for an offense; or to effect a purpose tending to prejudice the public; or to commit by criminal or unlawful means, a private injury which would not constitute a crime if done by an individual. (H's G. & M., p. 363.)

§ 2. The several constituents of conspiracy.—To constitute a conspiracy there must be: (1) Two or more persons, so that husband and wife, being one person in law, cannot by themselves be convicted—also acquittal of all but one involves the acquittal of him too; and (2) an agreement; hence the offense is complete if an agreement to do the act in question be made, although nothing be done in pursuance of the agreement. (H's G. & M. p., 363.)

§ 3. Instances of conspiracies enumerated.—A confederation to commit a felony or misdemeanor, statutory or common law, is a conspiracy, and if the offense be committed, the conspiracy merges if the offense be a felony, but not so if it be only a misdemeanor.

A conspiracy to charge one falsely with crime is likewise criminal, but not so where two or more persons consult and agree to prosecute one who is guilty, or against whom there is reasonable grounds of suspicion. But a conspiracy to extort hush-money is an offense, whether the charge be true or false, or whether criminal or not.

Conspiracies prejudicing the public are such, generally, as may endanger public health, violate public morals, insult public justice, destroy the public peace, or affect public trade or business—e. g., conspiring forcibly or fraudulently to raise or depress the price of labor, or by threats or other unlawful means to keep an operative out of employment, or to molest and obstruct workmen with a view to induce them to leave their employment, or to engross by coercion or fraudulent means any particular business staples, such as wheat or coal, so as to force the purchase by consumers at exorbitant prices, or to suppress competition at a public auction.

It is also an offense to conspire to commit by criminal or unlawful means a mere private injury, as to cheat privately, to hiss at a theatre, to blast the character of a person, whether

by word of mouth or in writing, and such like instances; but it is no offense to conspire to commit a mere civil trespass.

And it should be observed that when the conspiracy is to effect an unlawful purpose, such purpose should be averred; and if the conspiracy consists in the unlawful means to accomplish an indifferent or lawful purpose, the means should then be alleged. (H's G. & M., pp. 363-4.) Strikers are also conspiracies—see *Strikes*.

Conspiring to commit a person to an institution for the feeble-minded is punishable by a fine not over \$1,000, or jail not over one year, or both. (Code, § 1084.)

For conspiracy against the government see Code, § 4392.

For conspiracy by convicts in the penitentiary, see Code, § 5050.

§ 4. Form of "description" under warrant or indictment.

NO. 1. CONSPIRING TO CHARGE A PERSON WITH AN OFFENSE (*Idem.*)

DESCRIPTION:

"together with E. C., and C. F., intending unlawfully and without just cause to subject him the said A. B., to disgrace and grievous bodily punishment, did then and there falsely and maliciously conspire, confederate, and agree together to charge and accuse him the said A. B., that he had lately before [here describe the offense in terms of the statute or of its definition, or even with greater particularity when practicable]."

NO. 2. PRISONERS CONSPIRING TO ESCAPE FROM JAIL (*Idem.*)

DESCRIPTION:

"together with E. C., and C. F., having lawfully been imprisoned in the common jail of said county, in the custody of the keeper thereof, by virtue of legal process against them, and intending to effect their escape from and out of the said jail and custody, did then and there conspire, confederate, and agree among themselves, unlawfully to effect their escape from and out of the said jail and custody."

NO. 3. CONSPIRING TO ENGROSS AND MONOPOLIZE AN ARTICLE OF TRADE (*Idem.*)

DESCRIPTION:

"together with E. C., and C. F., being each of them buyers and sellers of a certain necessary article of food for man, called "clipped herring" (or other article), did then, and for a long time before and after, unlawfully conspire, combine, confederate, and agree together, for their private gain, to acquire, obtain, and engross into their hands and pos-

session all clipped herrings then brought to R., in said county, or thereafter to be brought there, to make a monopoly thereof, and to make and enhance at their will and pleasure the price of such herrings, the same being a necessary article of food."

CONTEMPTS

See Obstruction of Justice

I. CONTEMPTS IN COURT

- § 1. When courts may punish summarily for contempt
- § 2. Punishment of first class of contempts
- § 3. Punishment of the other three classes of contempts
- § 4. Contempts not embraced by statute; how punished
 - (1) Misconduct of inferior judges and magistrates
 - (2) Misbehavior toward the court, out of its presence and not directly obstructive of its proceedings
 - (3) Malpractice of attorneys
- § 5. Remitting punishment in case of contempt

II. CONTEMPT BEFORE A JUSTICE

- § 6. Power of justice to punish for contempt
- § 7. Proceeding before a justice for contempts
- § 8. Appeal from sentence of justice; how; what justice to certify; how appeal heard and decided
- § 9. Various forms under "Contempts"

I. CONTEMPTS IN COURT

§ 1. When courts may punish summarily for contempt.—

By section 4521 of the Code: "The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice (e. g., by rude and contumelious behavior towards the court or judge; obstinacy, perverseness, prevarication, or the like);

(2) Violence or threats of violence to a judge, or officer of the courts, or to a juror, witness, or party going to, attending, or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

(3) Obscene, contemptuous, or insulting language addressed to or published of a judge for or in respect of any act, or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing, for or in respect of such act or proceeding;

(4) Misbehavior of an officer of the court in his official capacity (e. g., by acts of oppression; needless violence, inhumanity; extortion; injustice; gross, willful, or corrupt neglect of duty; or other corrupt practice);

(5) Disobedience or resistance of an officer of the court, juror, witness, or other person, to any lawful process, judgment, decree, or order of the said court. Judge has same power in vacation as in court to enforce obedience to its decrees and orders. (Code, § 6309.)

§ 2. Punishment of first class of contempts.—By section 4525 of the Code: “No court shall, without a jury, for any such contempt as is mentioned in the first class embraced in section 4521, impose a fine exceeding \$50, or imprison more than ten days; but in any such case the court may impanel a jury (without an indictment, information, or any formal pleading) to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict.”

§ 3. Punishment of the other three classes of contempts.—Any contempt embraced in classes (2), (3), (4), and (5) of section 4521 of the Code are punishable by the court by attachment and in summary way, with fine and imprisonment, or either.

The course of procedure is, first to serve on the party a summons or rule, returnable at a certain time, requiring him to show cause why he should not be fined, if only punishment by fine be contemplated; or, in other cases, why an attachment should not issue against him. If he fails to appear, the court may, in the first case, fine him in his absence; and, in the other cases, the court confirms and makes absolute the original rule and then issues an attachment against him to answer for the contempt. Indeed, in very flagrant cases of contempt, the attachment may issue in the first instance. The attachment has no other object than to bring the party into court. So that, if the party upon being served with

a rule to show cause why an attachment should not issue, appear in court in person, and instead of moving to discharge the rule, submit to interrogatories, the court may proceed at once to judgment. Both the rule and attachment are dispensed with when the contempt is committed in the face of the court. (H's G. & M. pp. 256-7.)

§ 4. Contempts not embraced by statute; how punished.

—Besides the several instances of contempt enumerated in the statute (see section 1, above), the following are likewise contempts, punishable, however, in a different manner, but with the same penalty:

(1) Misconduct of inferior judges and magistrates.—Thus: Usurping jurisdiction without any color or right; trying one's own cause; acting oppressively or irregularly, as giving judgment without previous summons or notice; disobeying lawful mandates of superior courts, as writs of prohibition, mandamus, or the like; acting in contemptuous disregard of determinations of superior courts; refusing, without reasonable cause, to proceed at all; and such like.

(2) Misbehavior toward the court, out of its presence, and not directly obstructive of its proceedings.—Thus: Speaking or writing contemptuously of the court or judge in his judicial capacity; impeaching his purity, impartiality, or integrity as to any case before him; attempting to influence his decision by written or oral publication calculated and intended to excite public prejudice; treating the process or order of court with disrespect; perverting process to purposes of private malice or injustice; publishing false or even true accounts, without authority, of causes pending; and the like.

(3) Malpractice of attorneys, who, being officers of the court, are as much amenable thereto for their professional conduct as other officers thereof. Thus: Instituting or defending suits without authority; protecting suits by disingenuous artifices; deceiving the court; base and unfair dealings toward clients, as charging for business never done; refusing to deliver client's papers; omitting to pay money collected; or any other professional misconduct.

At common law these contempts were proceeded for in a summary manner as in other cases of contempt; but, by the

statute, attachment and summary proceedings are prohibited, except in the cases therein enumerated; so that proceedings for the contempts named in this section must be by indictment, information, or presentment, as for other offenses, and the punishment is by fine or imprisonment, or by both. (H's G. & M., pp. 257-8.)

§ 5. Remitting punishment in case of contempt.—By section 2557 of the Code: "No court shall remit a fine, except for a contempt, which the court, during the same term, may remit either wholly or in part. This section shall not impair the judicial power of the court to set aside a verdict or grant a new trial."—See *Fines*, section 3.

II. CONTEMPTS BEFORE A JUSTICE

§ 6. Power of justice to punish for contempt.—By section 4522 of the Code: "A justice, while engaged in the trial of a case, or in any judicial proceeding, shall have the same power and jurisdiction as a court to punish summarily for contempt (see section 1, above), but in no case shall the fine exceed \$20, or the imprisonment exceed ten days, for the same contempt."

§ 7. Proceeding before a justice for contempts.—Any contempt embraced by the first class, being committed in the presence of the justice, no rule or other process is necessary; and the party offending being present may summarily and at once be punished by fine or imprisonment, or by both, without any further proof or examination.

If the contempt belong to any of the other classes above named, the course of procedure is first to issue and have served on the party a summons or rule, returnable at a certain time, requiring him to show cause why he should not be fined, if only punishment by fine be contemplated, or, in other cases, why an attachment should not issue against him; if he fails to appear, the justice may, in the first case, fine him in his absence, and in the other cases the justice issues an attachment against him to answer for the contempt. Indeed, in very flagrant cases of contempt the attachment may issue in the first instance.

The attachment has no other object than to bring the party before the justice. So that if the party, upon being served with a rule to show cause why an attachment should

not issue, appear before the justice in person, and instead of moving to discharge the rule, submit to interrogatories, the justice may proceed at once to judgment. (H's G. & M., p. 406.)

§ 8. Appeal from sentence of justice; how; what justice to certify; how appeal heard and decided.—By section 4523 of the Code: "Any person sentenced to pay a fine, or to imprisonment, under the preceding section, may appeal therefrom to the court of the county or corporation in which the justice resides, or to the judge thereof in vacation, upon entering into a recognizance before the justice, with surety and in a penalty deemed sufficient, to appear before said court on the first day of the next term, or before the judge in vacation, to answer for the offense. If such appeal be taken, a certificate of the conviction and the particular circumstances of the offense, together with the recognizance, shall forthwith be transmitted by the justice to the clerk of said court, who shall immediately deliver the same to the judge thereof. Such judge may hear the case in term or in vacation upon the said certificate and any legal testimony adduced on either side, and make such order therein as may seem to him proper. Such order when made in vacation shall be entered in the order book of the court and have the same force and effect as an order entered in term."

§ 9. Various forms under "Contempts."—

NO. 1. RULE OR SUMMONS AGAINST A PERSON TO SHOW CAUSE WHY HE SHOULD NOT BE FINED, OR WHY AN ATTACHMENT SHOULD NOT ISSUE FOR CONTEMPT

(Code, §§ 4985, 4522.)

—county, to-wit:

To X. Y., constable of said county:

You are hereby commanded, in the name of the Commonwealth of Virginia to summon C. D., to appear at —, in said county, on the — day —, 192—, at — a. m., before me, J. T., a justice for said county, now engaged in the trial of the case of — against —, then and there to show cause, if any he can, why he should not be fined (or *why an attachment should not be issued against him*) for contemptuously disobeying my lawful process of subpoena summoning him to appear at —, in said county, on the — day of —, 192—, as a witness on behalf of — on the trial of the said case before me, the said justice (or for any other contempt, according to the facts); and herein fail not at your peril.

Given under my hand and seal, this — day of —, 192—.

J. T., J. P. [L. s.]

No. 2. ATTACHMENT AGAINST A PERSON TO ANSWER FOR CONTEMPT
(*Idem.*)

—county, to-wit:

To X. Y., constable of said county:

Whereas, while I, J. T., a justice for said county, was engaged in the trial of the case of — against —, C. D., did contemptuously disobey my lawful process of subpoena summoning him to appear at — in said county, on the — day of —, 192—, as a witness on behalf of —, on said trial (or did contemptuously commit some other contempt, stating it according to the facts)*; and whereas the said C. D., was duly summoned by me to appear at —, in said county, on the — day of —, 192—, at — a. m., before me, the said justice, then and there to show cause, if any he could, why an attachment should not issue against him for the said contempt, and has failed to appear and show cause as aforesaid required of him:*

These are, therefore, in the name of the commonwealth of Virginia, to command you to attach and bring before me the body of the said C. D., to answer for the said contempt, and further to be dealt with according to law; and herein fail not at your peril.

Given under my hand and seal, this — day of —, 192—.

J. T., J. P. [L. s.]

If the justice desires to issue an attachment in the first instance, without a previous rule omit the matter between the two stars; otherwise, use the entire form.

No. 3. JUDGMENT IMPOSING A FINE FOR CONTEMPT
(*Idem.*)

—county, to-wit:

The defendant C. D., is found guilty of the contempt charged within, and is adjudged to pay a fine of — dollars and \$— costs. This — day of —, 192—.

J. T., J. P.

No. 4. JUDGMENT OF IMPRISONMENT FOR CONTEMPT
(*Idem.*)

—county to-wit:

The defendant C. D., is found guilty of the contempt charged within, and is adjudged to be confined in the jail of — county for the term of — days (not exceeding 10 days). This — day of —, 192—.

J. T., J. P.

No. 5. COMMITMENT FOR CONTEMPT IN JUSTICE'S COURT, IN HIS PRESENCE
(*Idem.*)

—county to-wit:

To X. Y., constable of said county, and to the keeper of the jail of said county:

Whereas, while I, J. T., a justice for said county, was engaged in the trial of the case of — against —, C. D., did contemptuously refuse to be sworn (or to give evidence) on behalf of —, on said

trial, he having been duly summoned for that purpose, and being then present before me and required so to do (or did contemptuously commit some other contempt in the justice's presence, according to the facts):

These are, therefore, in the name of the Commonwealth of Virginia, to command you, the said constable, to take the said C. D., and convey him to the jail of said county, and there deliver him to the keeper thereof, together with this process; and you, the keeper of the said jail, are hereby commanded to receive the said C. D., into your custody in the said jail, and him there safely keep for the period of — days (not exceeding *ten* days), or until he be otherwise discharged by law.

Given under my hand and seal, this — day of —, 192—.

J. T., J. P. [L. s.]

No. 6. CERTIFICATE OF CONVICTION AND THE CIRCUMSTANCES OF THE CONTEMPT, WHERE AN APPEAL IS TAKEN

(*Idem.*)

—county, to-wit:

Be it remembered, that on the — day of —, 192—, C. D., was convicted before me in due form of law, of a contempt, in this [here describe the contempt; wherefore I adjudged that he be [here state the punishment, whether a fine or imprisonment]. But the said C. D., having prayed an appeal from my said judgment to the circuit court of said county (or *to the judge of the circuit court of said county in vacation*), and the said C. D., having this day entered into a recognizance before me, with sufficient surety, in the sum of — dollars, to appear before the said court (or *the judge of the said court in vacation*), on the — day —, 192—, to answer for the said contempt, an appeal is hereby granted the said C. D., according to law, and the said judgment and conviction as well as the said appeal, are hereby certified to the said circuit court (or *to the judge of the said court*).

Given under my hand and seal, this — day of —, 192—.

J. T., J. P. [L. s.]

No. 7. RECOGNIZANCE TO ANSWER FOR CONTEMPT, WHERE AN APPEAL IS TAKEN

(*Idem.*)

[Follow No. 9, under *Justice of the Peace*, Division VI., section 14, and conclude as follows]:

Yet upon this condition, that whereas the said C. D., was this day tried before me for contempt in [here insert the penalty, whether imprisonment or a mere fine]; from which said judgment and conviction the said C. D., took an appeal to the circuit court of said county (or *to the judge of the circuit court of said county in vacation*): Now, if the said C. D., shall personally appear before the said circuit court on the first day of the next — term thereof (or *before the said judge in vacation*, at —, on the — day of —,

192—), to answer for the said contempt, whereof he has been found guilty and convicted by me, and shall not thence depart without leave of the said court, then this recognizance shall be void, otherwise to remain in full force and virtue.

Taken and acknowledged before me, in said county, the day and year first above written.

J. T., J. P.

CONTRACTS

See *Alteration of Writings; Architect and Builder; Cancellation of Writings; Recordation or Registry*

- § 1. Definition
- § 2. Essentials of a contract
 - (1) Competent parties
 - (2) Lawful subject-matter
 - (3) A valuable consideration
 - (a) Definition of a valuable consideration
 - (b) Amount of the consideration
 - (c) Past consideration not sufficient
 - (d) Concurrent considerations
 - (e) When a valuable consideration is implied
 - (4) Mutual assent of the parties
- § 3. Law of what state or country regulates contracts
- § 4. What contracts must be in writing
 - (1) Representation or assurance to aid one to obtain credit, money, etc.
 - (2) New promise or ratification by a minor after coming of age
 - (3) Promise by administrator, etc., to pay debt or damages personally
 - (4) Promise to answer for the debt, default or misdoings of another
 - (a) In general
 - (b) The "debt of another"
 - (c) The "default or misdoings of another"
 - (d) When guarantor is discharged
 - (5) "Agreement made upon consideration of marriage"
 - (6) "Contract for sale of real estate for the lease thereof for more than a year"
 - (7) "Agreement that is not to be performed within a year"
 - (8) New promise repelling the bar of the statute of limitations
 - (9) The writing and its requisites

- § 5. Alteration or cancellation of writings—See *Alteration of Writings; Cancellation of Writings*
- § 6. Release of contracts
- § 7. Contract to convey or lease land
 - (1) When to be in writing
 - (2) When, in equity, contract need not be in writing
 - (3) How contract of sale considered in equity
 - (4) Contract may be discharged verbally
 - (5) Recordation—See *Conveyances*, section 14, and *Recordation or Registry*
- § 8. Wagering, gambling, or gaming contract
 - (1) Definition
 - (2) Gaming contracts are void
 - (3) Recovery of money or property lost in gaming
 - (4) Bill by loser against winner; upon re-payment, winner discharged from other forfeitures
- § 9. Contracts to marry and breaches thereof—See *Marriage*, section 7
- § 10. Contracts for materials and work
- § 11. Contracts for service and work
 - (1) Effect of such contracts
 - (2) Contracts providing for compensation upon contingency
 - (3) Abatement of price for defective work
 - (4) Lien for work and supplies—See *Liens of Mechanics and Others*

§ 1. **Definition.**—A contract is a mutual agreement between two or more competent parties, touching a lawful subject-matter, for a valuable consideration.

§ 2. **Essentials of a contract.**—

(1) *Competent parties.*—Any person may contract, except the following: (a) *Idiots*, who from their birth are wanting in understanding; (b) *Lunatics*, who from events occurring after birth are deprived of their understanding, whether with or without lucid intervals. See *Conveyances*, section 4; *Wills*, section 2; (c) *Minors*, with certain exceptions—see *Minors*, section 8; and *Parent and child*, section 2; (d) *Drunken persons*—See *Conveyance*, section 4; (e) *Married women formerly*—see *Married Women's Property and Other Rights*, sections 2 and 4. (f) *Persons under duress*—see *Conveyances*, section 4; *Wills*, section 2, (3); (g) *Alien enemies*—see *Aliens*.

(2) *Lawful subject-matter*, i. e., the contract must not be contrary to the terms or the policy of the law, common law or

statute, e. g., not in restraint of trade or of marriage, nor tend to immorality, as, for illicit cohabitation, or the like.

As to things not yet come into existence, or not yet belonging to the party, it is sufficient if it have, (1) a potential, though not an actual, existence, as, being the natural product or expected increase of something already belonging to him, such as the crops to be grown on his field, the wool to be clipped from his sheep, the milk from his cows the coming month, the colts of his mares the coming spring, etc.; or (2) such property as he may afterwards acquire: the former he may actually sell, the risk of loss being in the purchaser; while the latter he can only agree to sell, when the risk remains with the seller. If at the time of the contract the thing has ceased to exist, the sale is void. (3 Min. Inst. 129-31.)

(3) *A valuable consideration.*—No consideration is necessary for an executed contract, as; a gift, but for an executory contract (one yet to be performed), verbal or written (but not under seal), a consideration actual or implied, is indispensable; but it need not be stated in the contract, but may be proved. Moral consideration is not sufficient; though a debt barred by limitation is a valuable consideration.

A valuable consideration is required to prevent the promisor from being imposed upon by claims founded on unconsidered or misrepresented engagements; or to prevent his administrator or executor from being imposed upon or from being tempted to collusion, in fraud of his estate; or to present his *bona fide* creditors from being cheated by pretended engagements, in fact never made.

(a) *Definition of a valuable consideration.*—A valuable consideration is defined to be “a benefit to the party promising, or to a third person at his request; or an injury, loss, charge, or inconvenience, or the risk thereof, to the party promised;” as, money, waiver of a wrong, or of any legal right, including a liability, postponing a demand, or forbearing to enforce it for a time, doing any act, intrusting a party with one’s personal property, assigning a debt or right, compromising a colorable claim, a promise on the part of the promisee, a debt or claim barred by limitation, or the like.

(b) *Amount of the consideration.*—The amount of the consideration is between the parties themselves, is wholly immaterial, so it be appreciable. But gross malegnacy, along with

other considerations, may be sufficient proof of fraud to vitiate the transaction. Indeed, if the inadequacy be so gross as to shock the conscience of a person of common sense, it may be taken as *prima facie* proof of fraud.

(c) *Past consideration not sufficient.*—A past consideration is one which has already taken place, without request, and is not sufficient to support a promise, except where a previous request may be implied, as it is, (1) where one is compelled to do what another ought to have done and was compellable to do, as, where a surety pays money for his principal; (2) when one adopts and takes advantage of the benefit of the past consideration, as, where a principal takes goods bought by an agent without authority, or a father allows goods bought by a minor to be used by him; (3) where one does without compulsion what another was compellable by law to do, as, where one owes a debt, and another pays it, and afterwards the debtor promises to repay the one paying it, the promise being express, but the request to pay it being implied.

(d) *Concurrent considerations.*—These arise in case of mutual simultaneous promises, the one promise being a valuable consideration to support the other; as, where several promise to contribute to a common object, as to build a church, school-house, etc.; or where two competitors for a premium agree to divide it; or where persons agree to become partners.

(e) *When a valuable consideration is implied.*—This takes place, (1) where the contract is under seal, when the consideration is conclusively presumed at law and generally in equity, as between the parties; (2) recognizances; (3) negotiable instruments—*prima facie* as between the parties, and conclusively, as to subsequent *bona fide* holders for value (see Code, §§ 5586-91); (4) promissory notes not negotiable, by force of the statute (§ 5759) allowing an action of debt or assumpsit thereon. (3 Min. Inst. 131-40.)

(4) *Mutual assent of the parties.*—It is necessary to a contract that there be a mutual assent—a concurrence of wills—an assent, to the same thing, at the same time. So if there is a mistake of fact, there is no mutual assent. The assent must be to the precise terms offered; and if there be any malification of the proposal, the proposal as modified must be assented to. A party making an offer may withdraw it any time before it is accepted. An offer must be accepted within a reasonable

time, else the others will not be bound. The mutual assent may be made by letter, telegram, or telephone. The acceptance dates from the time the letter or telegram is placed in the office for transmission. A withdrawal of such an offer dates from the time it reaches the other party—from the time the message of withdrawal is sent, Prof. Minor thinks it should be. (3 Min. Inst. 140-2.)

A writing payable to a person who is dead, is, by statute (§ 5761), valid.

§ 3. Law of what state or country regulates contracts.

—As to the capacity of the parties to contract, the general rule is the law of the place where the contract is made, controls, but if it is made to be performed in another state or country, then it is controlled by the law there.

As to the effects and rights growing out of contracts relating to real estate, the law of the place where it is situated controls; if the contracts relate to personal property, the general rule is the law follows the person, so the law of his domicile controls; if the contracts impose a personal obligation, such as to pay money, the law of the place with reference to which the contract is made, controls, as, the rate of interest, the lawfulness of the contract, etc. As to remedies on contracts, the laws of the country where the remedy is asserted, governs; as, who is competent to testify, what evidence is sufficient, what limitation applies, etc.; except “upon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained (here) after the right of action therein is barred by the laws of such state or country,” (Code, § 5825); and a somewhat similar provision is applied as to judgments (Code, § 5819). (3 Min. Inst. 143-6.)

§ 4. What contracts must be in writing.—Besides deeds and wills, section 5561 of the Code, commonly called “the statute of parol (or verbal) agreements,” requires the following contracts to be in writing: “No action shall be brought in any of the following cases:

First, To charge any person upon or by reason of a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, to the intent or purpose that such other may obtain thereby, credit, money, or goods; or,

Second, To charge any person upon a promise made, after full age, to pay a debt contracted during infancy, or upon a ratification after full age, of a promise or simple contract made during infancy; or,

Third, To charge a personal representative upon a promise to answer any debt or damages out of his own estate; or,

Fourth, To charge any person upon a promise to answer for the debt, default, or misdoings of another; or,

Fifth, Upon any agreement made upon consideration of marriage; or,

Sixth, Upon any contract for the sale of real estate, or for the lease thereof for more than a year; or,

Seventh, Upon any agreement that is not to be performed within a year;

Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence."

And to the above may be added:

Eighth, Upon a new promise to pay money on any award or contract, in order to repel the bar of the statute of limitations (Code, § 5812).

(1) *Representations or assurance to aid one to obtain credit, money, etc.*—See 3 Va. Law Reg. 910.

(2) *New promise or ratification by a minor after coming of age.*—Only the promise or ratification need to be in writing; the date and amount may be proved. For the law as to confirmation of a minor's contract, see *Minors, Infants, or Children*, section 8.

(3) *Promise by administrator, etc., to pay debt or damages personally.*—All the common requisites of a contract (see section 2, above) must be in the promise.

(4) *Promise to answer for the debt, default, or misdoings of another.*—(a) *In general.*—This embraces all that class of promises usually called guaranties. Here, also, the common law essentials of a contract must exist in the promise, as, competent parties, a lawful subject-matter, a valuable consideration, and mutual assent (see section 2, above). As to "mutual assent," if the offer of guaranty is direct and unconditional, its

acceptance is presumed unless the contrary is shown, or unless the rejection be made known within a reasonable time; but if the guaranty is general, and not addressed to some particular person, or where, though addressed to a particular person, it relates to a future credit, in order to mutuality notice must be given to the guarantor that the creditor has accepted or acted upon the guaranty, and has given credit on the faith of it; and if the notice of advances from time made, and of the principal's default, be not promptly given, and any injury result to the guarantor from the omission he is to that extent relieved of liability.

(b) *The "debt of another."*—The statute applies only where the original debtor continues liable; if his liability ceases, the promise is direct or original and need not be in writing. Thus: If A says to a merchant, "Let B have what he pleases to order, and I will see you paid," B's liability continues, and A's promise must be in writing; but otherwise, if A has said, "Let B have such goods as he may order and I will pay you," or "and charge them to me." As to whether the credit was given solely to the promisor depends upon all the circumstances, including the language used; and the same words may be construed differently according to circumstances. Entry at the time of the credit in the books, while some proof against both parties, it is stronger against the creditor.

The material inquiry always is, whether, at the time of the promise, the demand to which it relates is in fact the debt of another. So, where the consideration of the promise is the creditor's releasing a charge or lien on goods, as, by execution, distress, or otherwise, which afforded him the means of payment immediately, the case is not, to the extent of the value of the property or the means of enforced payment, within the statute, but is an original promise between the promisor and the creditor, founded on the relinquishment of the lien or charge: but otherwise, "if as to any demand or claim embraced in the promise not covered by such lien or charge (as arrears of rent not yet due,) or as to the excess of the debt above the same; and as the promise, in such case, is entire, and part of it cannot be enforced, none of it can, it not being in writing. Also, where the plaintiff having goods in his possession, with power to sell them, forbears to do so in consideration of a promise to pay by the debtor, the promise is original, and need

not be in writing; as, indeed, in all cases where the creditor, him; or where the original party is not by law liable for the by accepting the promisor's liability, relinquishes his claim on the original party, and becomes wholly without remedy as to demand, as in the case of goods, not necessities, supplied to a minor.

(c) *The word "default or misdoings of another."*—The word "default" refers specially to failure to perform a contract, or perhaps to the non-performance of any duty whatever. "Misdoings" refers specially to torts (or wrongs).

(d) *When guarantor is discharged.*—see *Sureties*. (3 Min. Inst. 177-91.)

(5) *"Agreement made upon consideration of marriage."*—This does not apply to a contract to marry, or to contracts of which the consideration is marriage, but to other contracts in consideration of marriage, such as settlements of property upon marriage, or ante-nuptial contracts. By statute (§ 5185) marriage is not a valuable consideration to support a conveyance, assignment, etc., as to existing creditors—see *Fraudulent and Voluntary Conveyances*. (3 Min. Inst. 191-3.)

(6) *"Contract for the sale of real estate or for the lease thereof for more than a year."*—Such a contract, if not in writing, is voidable only, and not void (110 Va. 31). For where partly performed, see (9), and section 7, below.

This clause applies to contracts to will real estate in a certain way (90 Va. 728); to an agreement between a purchaser and another to admit the latter as a partner in the purchase, or to sell him a portion of it (21 Grat. 678; 108 Va. 695; 113 Va. 511); to a contract to pay land, etc., for materials to build a house (79 Va. 290); to a contract for the sale of growing trees, which are to remain upon the land for further growth, though otherwise if to be severed immediately, or within a reasonable or convenient time, with a mere license to enter and take them away, without any stipulation for the beneficial use meanwhile of the soil (110 Va. 31, 380), or if they are branded under the statute (§ 1453).

But the clause does not apply to a verbal partnership to buy and sell land, nor to an agreement by a railroad company to maintain a switch for one's benefit so long as he may need it; nor to a mere license to do certain acts on land—see *License (on Lands)*.

The statute refers to a contract for a sale or lease, and not to a present sale or lease, which is governed by another statute (§ 5141), requiring a deed or will, where to convey land or a time therein for more than 5 years—see *Conveyances*. See, also, (9), and section 7, below. (3 Min. Inst. 193-6.)

(7) "*Agreement that is not to be performed within a year.*"—This clause refers to agreements that on their face have the performance postponed beyond one year. It does not apply to such as may or may not chance to be performed within that period, as, a promise to pay a certain sum upon a certain marriage, which in fact takes place more than a year afterward, or an option for more than a year on personal property which may be taken up any time, or on agreement for a year's service from date (though otherwise if it is to begin at a future time), or where an employee under a written contract for one year, continues to work on from year to year, or a contract to erect and maintain a gate at a railroad crossing and to provide a keeper, no time being mentioned for its performance, or a promise of support at death of promisor in consideration of service rendered, by the promisee during the balance of her life, or a verbal partnership without any fixed time, for its continuance, but whose business may be completed within a year (75 Va. 442; 85 Va. 928; 86 Va. 323; 96 Va. 670; 99 Va. 10; 120 Va. 458). (3 Min. Inst. 196-8.)

(8) *New promise repelling the bar of the statute of limitations.*—The writing must impart a promise to pay plainly and clearly, though it need not be in direct terms. An acknowledgment from which a promise may be implied, is sufficient. A promise to settle, or an acknowledgment of the justice of the claim, is not sufficient, though otherwise, if the context or surrounding circumstances show he meant by the phrases used, "to pay." The acknowledgment may be proved by acts or conduct as well as words; as, part payment, or paying interest, if definitely applied and appropriated thereto by the debtor.

An unqualified admission of a debt implies a promise to pay it, though such admission is accompanied by a request for indulgence not amounting to a condition; or it omits to name the amount, notwithstanding it may be in dispute, the true amount being provable by other evidence; but otherwise, if there is a refusal to pay or a condition is annexed. such as,

if or when the debtor is able to pay, "as far as your claim is just," or "after fixing the amount due," or the like.

The promise may be made by his agent (even his wife) when acting with due authority; by his counsel when with his knowledge and concurrence; but not by an administrator or executor so as to charge the estate, nor by one of two or more joint contractors so as to charge the others (Code, § 5813). (3 Min. Inst. 198-206.)

See, also, *Limitation to Remedies*, section 3, (4), (b).

(9) *The writing and its requisites*.—The writing may be on paper, parchment, linen, leather, slate, stone, metal, marble, etc., and may be in pencil or ink, written, typed, or printed, no form is required. Any memorandum signed by the party, expressing that he has entered into the agreement, and showing the parties and terms, is enough. Though it be a mere recognition or adoption of a prior written statement not signed.

The statute does not alter the nature and effect of a contract. The common law essentials therefor must exist,—competent parties, a lawful subject-matter, a valuable consideration, and mutual assent—see section 2, above. The statute says the consideration need not be expressed, and may be proved (where a consideration is necessary) by other evidence. The memorandum must contain all the essential elements,—parties, subject-matter, terms, and signature, but not the consideration. The statute requires the writing to be signed by the party or his agent. His name in contract (though he wrote it) is not sufficient, unless it appears the writing contains the final agreement, and that the name was designed to connect him with the writing as his own (119 Va. 791). The name may be signed by another in his presence and by his direction or by his authorized agent, whose authority however, need not be in writing. It is not necessary that he sign with his own hand, even by mark. If adopted as a signature his name may be written by another, or even printed. The writing, need not be signed by both parties; when the other sues he thereby in writing consents to it; but when the plaintiff is the only one who has signed it, the statute bars the proceeding.

An auctioneer at sales is the agent of both parties; and his or his clerks note or entry at the time in his minute of sale, of the subject, the parties, and the terms, binds either or both;

and as to the seller, he is his agent until the whole transaction is closed.

Where the terms of the statute are not complied with, while no action can be brought on the contract, yet the contract is not void, and so if it has been partly executed on one side under circumstances which would make it a fraud on the other party to deny its fulfilment, a court of equity will decree its complete performance on the opposite side. And so if money has been paid to a party in pursuance of the contract, the payment is a good one for all purposes and will charge the recipient as if it had come to his hands in pursuance of any other transaction. If the contract is executed or performed on one side, the statute does not apply; as, in case of a verbal contract for a lease for a term of years, where the lessee has entered and occupied the premises—see section 7, below. (3 Min. Inst. 167-73; 2 Mis. Real Prop., § 1289.)

§ 5. Alterations or cancellation of writings.—See *Alteration of Writings; Cancellation of Writings*.

§ 6. Release of contracts.—A release does not occur, (1) where a creditor makes his debtor his executor (Code, § 5377); (2) where one of several joint contractors or co-obligors is released by compromise by the creditor (Code, §§ 5763-4). A release occurs in the following cases: (1) where a creditor takes a higher security, as, as a bond or other contract under seal or a judgment in place of a simple contract, or one not under seal; (2) where the creditor alters the writing evidencing the demand in a material particular, or fraudulently—see *Alteration of Writings* and *Cancellation of Writings*; (3) where one of several promisees releases the promisor, unless where clearly made fraudulently; (4) where a surety, guarantor, or endorser gives the creditor 15 days' notice in writing to sue the principal debtor, and he omits to do so (Code, §§ 5774-5); (5) where the contract is under seal, a release by contract must also be under seal, but after breach, the damages may be compromised without such writing; (6) where the contract is not under seal, and is not broken, it may be released by mutual agreement without further consideration than their mutual assent, but after breach, there should be a consideration, expressed or implied, yet if the release or adjustment be under seal, no consideration need be proved; (7) part performance of a contract, either before or after a breach, when expressly accepted by the creditor in satisfaction and rendered pursuant to an agreement

for that purpose, though without any new consideration, extinguishes the contract (Code, § 5765).

No particular form of words is necessary for a release; any words showing an intention to renounce the claim on the debtor or to discharge him, is sufficient; as, that the creditor "is satisfied," or a covenant that the creditor will never sue the debtor, all the creditors and debtors being covered by the covenant. (3 Min. Inst. 211-17.)

§ 7. Contract to convey or lease land.—

(1) *When to be in writing.*—By section 5561 of the Code, a "contract for the sale of real estate, or for the lease thereof for more than a year" is required to be "in writing." For what is "real estate" or "land," see *Real Estate*, section 1. For where a lease (but not a contract for a lease) for over one but less than five years may be verbally, see *Landlord and Tenant*, section 1.

A mere license on land is not land nor an interest in land, and need not be in writing—see *License (on Lands)*, section 3. A contract with a purchaser of land for an interest therein, must be in writing (1 Munf. 510; 21 Grat. 680).

The "writing" may be ever so informal, just so it states with reasonable certainty the land and the estate or interest therein, and the terms of payment. It may be in print or handwriting, written with ink or pencil, or typewritten, and may be on paper, parchment, stone, steel, leather, linen, wood, or other thing, so it be in writing; but it need not, like a deed, be delivered. It may embrace another writing by a clear reference to it (6 Munf. 83; 6 Leigh 16; 6 Grat. 78; 9 Grat. 1; 92 Va. 521.)

It is not necessary that it should be signed by the purchaser. An auctioneer's or clerk's memorandum containing the names of the parties, made at the time and on the spot, binds the purchaser, or if made later but before the close of the transaction, it binds the seller, he being the agent of both parties to that extent (6 Leigh 16; 7 Leigh 165; 21 Grat. 682). (2 M's. Real Prop. §§ 1285-9.) See, also, *Contracts*.

(2) *When, in equity, contract need not be in writing.*—When the reduction to writing, or signing, has been prevented by the fraud of the promiser, equity will enforce it nevertheless.

Also, except as to gifts (Code, § 5141), and as to pur-

chasers for value and without notice and creditors (Code, § 5192), an oral agreement for the sale of land in part performed will be enforced in equity, in cases where the act of part performance would place the plaintiff (seller or purchaser) in a situation which would be a fraud upon him if the agreement was not enforced. But for part performance it is necessary that there be some act done (not merely abstaining from an act, as from bidding) by the party seeking relief, as by delivering or taking possession, or making improvements, and that the party aggrieved cannot be compensated in damages, as he could be for the purchased money, provided the seller is not insolvent (102 Va. 36; 101 Va. 70, 711, 814; 100 Va. 660, 664; 99 Va. 538).

To be enforced in equity, the contract must also be certain and definite in all its parts, not tainted with fraud (as, by misrepresentation or concealment), nor illegal, there must be no material mistake or misdescription as to the interest or quantity of land sold or in other respects; and the contract must be supported by an adequate valuable and legal consideration, which however the statute (§ 5561) says need not be expressed in the contract. A meritorious consideration, afforded by the relation of parent and child, husband and wife, or brothers, is not sufficient, as the statute (§ 5141) says that no right to a conveyance shall accrue by reason of a gift or promise of a gift not in writing, even though followed by possession and improvement. Consideration though valuable will not be sufficient, if it be so grossly inadequate as to shock the conscience and confound the judgment of any one of common sense. (2 M's. Real Prop., §§ 1290-1314.)

An agreement between the children in the father's lifetime to divide his estate in a certain way is not contrary to good morals or public policy, and is legal (1 Munf. 803; 1 Wash. 136).

But a contract between heir and ancestor, defeating the operation of the statute of descents, is void as contrary to public policy (102 Va. 124; 105 Va. 670). (2 M's. Real Prop., §§ 1290-1314.)

(3) *How contract of sale considered in equity.* A court of equity considers done that which should be done, and therefore considers a valid contract to convey as a conveyance, and the land as belonging to the purchaser (and descendable to his

heirs), treating the seller as a trustee of the land for the purchaser, and the purchaser as a trustee of the purchase money for the seller, and compelling a conveyance to the purchaser. (2 M's. Real Prop., § 1284.)

(4) *Contract may be discharged verbally.*—The contract for the sale or lease of land, though under seal, may be discharged or the time extended verbally, at law and in equity (103 Va. 238). (2 M's. Real Prop., § 1315.)

(5) *Recordation.*—See *Conveyances*, section 14, and *Recordation or Registry*.

§ 8. Wagering, gambling, or gaming contract.—

(1) *Definition.*—A wager or bet is a contract by which two or more persons agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain or unknown event.

(2) *Gaming contracts are void.*—By section 5558 of the Code: "All wagers, conveyances, assurances, and all contracts and securities whereof the whole or any part of the consideration be money or other valuable thing, won, laid, or bet, at any game, horse-race, sport or pastime, and all contracts to repay any money knowingly lent at the time and place of such game, race, sport or pastime, to any person for the purpose of so gaming, betting, or wagering, or to repay any money so lent, to any person who shall, at such time and place, so pay, bet or wager, shall be utterly void."

So, wagers are not only invalid, but many wagers or bets connected with unlawful games, with lotteries (or gift enterprises) and raffles, with horse-races, and with elections, are highly penal (Code, §§ 4676-94). See *Gambling or Gaming*.

Under this statute, the assignee of a gambling contract stands in no better situation than the obligee would have stood, unless the assignee, having no notice of the illegal consideration, has been induced, by the assurances of the obligor that he would pay it, to take the assignment. (3 Min. Inst. 326.)

A discount, by a bank of a note, in ignorance of the fact that the proceeds were to be used in gambling in stocks, is not within the purview of this section, though the endorser knew that the proceeds were to be so used. Such an endorser may acquire a good title from a bank which discounted the note without such notice. (116 Va. 834.)

(3) *Recovery of money or property lost in Gaming.*—By

section 5559 of the Code: "Any person who shall, by placing at any game or betting on the sides or hands of such as play at any game, lose within twenty-four hours, the sum or value of five dollars, or more, and pay or deliver the same, or any part thereof, may, within three months next following, recover from the winner, the money or the value of the goods so lost and paid or delivered, with costs of suit in civil action, either by suit or warrant, according to the amount or value thereof."

(4) *Bill by loser against winner; upon re-payment, winner discharged from other forfeitures.*—By section 5560 of the Code: "Such loser may file a bill in equity against such winner, who shall answer the same, and upon discovery and repayment of the money or property so won, or its value, such winner shall be discharged from any forfeiture or punishment which he may have incurred for winning the same."

This section should be so construed as to embrace all forms of gambling that its language is broad enough to cover (108 Va. 736).

§ 9. Contracts to marry and branches thereof.—See *Marriage*, section 7.

§ 10. Contracts for materials and work.—If the workman furnish the material and the work, the contract in effect is a contract of sale; but if the employer furnishes the material, or the principal part of them (as, the land, the workman furnishing all the material for a house), the contract is for work or services. If the transaction is a contract of sale, and the thing perishes by accident before delivery, the loss is the seller's or buyer's, according as the property has or has not passed (see *Sale or Exchange of Personal Property*, section 3); while if it be a contract for work and labor simply, the right of the workman to be paid for his labor, in case of the destruction of the property by accident before delivery, depends on the nature of the work and of the contract, express or implied. Thus: If the contract be entire and advisable, for the manufacture out of the employer's materials, of a specified article, for a designated sum to be paid on the completion and delivery of the article, and the partly manufactured article is destroyed in the hands of the workman by unavoidable accident, the employer loses his materials, and the workman the price of his labor; but if it be expressly agreed, or if it can be inferred

from the character of the work, or from other circumstances, to have been agreed that the price is not to be paid in one sum, but in instalments as the work advances (which is naturally to be presumed, if there is no contrary understanding, and the thing to be done is divisible and apportionable), then, upon such destruction, the employer loses both the material, and the labor up to the last elapsed period of payment. So where a printer agrees to print a book on the employer's paper, at so much per page, to be paid for on completion, if before completion the whole is consumed by fire, without the printer's fault, the employer loses the paper, and the printer his labor; but if the printer is to be paid by instalments, as the work proceeds, the employer loses the paper and the amount due the printer up to the last instalment finished.

Likewise, if a workman be employed to repair an article, the material attached thereto immediately becomes the property of the employer by an implied contract of sale, and if it is destroyed in the workman's hands, without his fault, the employer loses the property and must also pay for the labor, unless it has been stipulated, expressly or impliedly, that payment is to be postponed until the work is completed, in which event, the workman loses his labor. And the same is true as to a building erected on the employer's land with materials supplied by the workman. As soon as the workman attaches his materials to the land (but not as soon as they are placed upon it), they become the property of the owner of the land; and if the building be destroyed, without default of the contractor, he is entitled to be paid for the materials used, and also for his labor, unless it has been, expressly or impliedly, agreed that no payment is to be made until the structure is completed or completed and delivered; but if the price is to be paid in instalments, as certain specified portions of the work is completed, the employer pays for the material used and the due instalments.

And the same principles apply when the employer or workman becomes bankrupt or insolvent, or where the workman sells the manufactured product to a stranger. (3 Min. Inst. 321-5.) But see *Liens of Mechanics and Others*.

§ 11. Contracts for service and work.—

(1) *Effect of such contracts.*—Where there is a contract to do work, or to render service, the law implies a promise

on the side to do the work with care, diligence, and skill, or according to the order given or assented to, and on the other, to pay in money, if no specific price or mode of payment is stipulated, a reasonable remuneration therefor. Where a specific price has been agreed on, a subsequent promise, without any new consideration, to pay an additional sum for the same services, is void. But it seems if one refuses to fulfill his engagement, and the other makes a new promise on consideration that he will proceed with it, it is valid.

Where it appears the work was done with no expectation of reward, but from considerations of love or moral duty, or from an unauthorized expectation of a legacy, or from any other like cause, no promise to pay is implied.

An express agreement that this work shall be done gratuitously is void; but if the promisor enters upon it, and is guilty of any malfeasance (or damage) in performing it, he is liable therefor, the committing of the work to him being a sufficient consideration for the promise, which the law implies, to do it with the care and skill required.

The performance of the work is to some extent a condition precedent to the payment, so the workman, to recover, must show performance or that the employer prevented performance. Where the consideration is entire and indivisible, and the whole work is to be performed before any payment, no action lies (so long as the contract remains open and not rescinded) for a part execution thereof though the employer may have profited thereby; but if the thing to be done is in its nature divisible and apportionable, with nothing expressed or implied, to preclude recovery for a partial execution, the workman may recover for a part, even if the work be destroyed by accident (see section 10, above). And so where the thing to be done is divisible and apportionable, and there is no stipulation for an entire performance before payment, a part-performance will sustain an action for the price, but with a reduction for any imperfection in the work.

For additions and extra work ordered by the employer, he in the absence of any contrary stipulation, must pay at the contract rate, if the terms of the agreement can be traced in the additional work; but if they cannot be traced, or if the contract in the entire execution be so entirely deviated from that its provisions are no longer traceable, the work must be

paid for by measure and value at the ordinary rate of charging. Where the employer, when he proposes the alterations, is not informed by the workman, and has no reason to believe, that they will enhance the contract price, he is not liable to pay anything therefor; and the same is true as to furnishing better material or doing better work. (3 Min. Inst. 330-3.) See *Employer and Employee*.

(2) *Contracts providing for compensation upon contingency*.—A contract may make the amount of remuneration or the payment depend upon a future contingency, as, the report of an architect or engineer, which must take place before any recovery. But where the compensation is made to depend on the completion of the work by a certain day, and it is not so completed, but is afterwards accepted, or where dependent on the satisfaction of the employer, or his opinion as to what is proper to be paid, a reasonable and proper compensation may be recovered nevertheless; but otherwise, where the question whether the employer is to pay anything is left to him. (3 Min. Inst. 334-5.) See *Architect and Builder*.

(3) *Abatement of price for defective work*.—Notwithstanding the acceptance of the work, the employer may show any defect in the execution, in reduction of the amount. Where the work is done to the employer's own property, though the work is defective, he must necessarily accept, and pay what the work is reasonably worth; but if the character of the work is such that no benefit accrues to him if he declines to accept, he may refuse altogether, if the work is not substantially in conformity with the contract. (3 Min. Inst. 335-6.)

(4) *Lien for work and supplies*.—See *Liens of Mechanics and Others*.

§ 12. Various forms of "Contracts."—

NO. 1. GENERAL FORM OF AGREEMENT OR CONTRACT

(Code, § 5170.)

This agreement, made this _____ day of _____, 192—, between P. P., of _____, of the one part, and D. D., of _____, of the other part, witnesseth: that the said P. P., for the consideration hereinafter mentioned, doth covenant and agree with the said D. D., that he, the said P. P., shall and will (here insert agreement on part of P. P.). And the said D. D., for the consideration hereinbefore mentioned, doth covenant and agree with the said P. P. that he, the said D. D., shall and will (here insert the agreement on part of D. D.).

This agreement is signed in duplicate, each party holding a copy.
Witness our hands and seals, the day and year first above written.

P. P. [L. s.]

D. D. [L. s.]

No. 2. CONTRACT FOR THE SALE OF LAND
(Code, §§ 5170, 5192-6.)

This agreement, made this _____ day of _____, 192—, between P. P., of _____, of the one part, and D. D., of _____, of the other part, witnesseth: that the said P. P., for the consideration of one dollar to be paid by the said D. D., pursuant to the covenant and agreement hereinafter mentioned, doth covenant and agree with the said D. D., that he, the said P. P., shall and will, on the _____ day of _____, grant and convey, by good and sufficient deed, a complete title in fee-simple, free from all incumbrances, claims, and demands whatsoever, all that parcel or tract of land with its appurtenances, lying (here describe the land with reasonable particularity).

And the said D. D., for the consideration of the covenant and agreement hereinbefore mentioned, doth covenant and agree with the said P. P. that he, the said D. D., shall and will pay to the said P. P. the sum of _____ dollars, in instalments, as follows: (here state the terms of payment).

This agreement is signed in duplicate, each party holding a copy.

Witness our hands and seals, the day and year first above written.

P. P. (L. s.)

D. D. (L. s.)

A "title-bond" is an obligation by vendor or vendee to pay money, if conveyance be not made or purchase price be not paid, as the case may be; but this agreement binds at once both parties, and the liability on it is as great as on a title bond, and so it is preferable. But, for a title bond, see No. 3, under *Bonds*.

No. 3. ANOTHER FORM OF CONTRACT FOR THE SALE OF LAND
(Tate's Forms, 29; Code, above.)

Articles of agreement entered into this _____ day of _____, in the year _____, between C. C., of _____, of the one part, and D. D. of _____, of the other part: Witnesseth, that the said C. C., for and in consideration of the sum of _____ dollars in gold, to be paid by the said D. D. pursuant to the covenant and agreement of the said D. D. hereinafter mentioned, doth, for himself and heirs, covenant and agree with the said D. D., and his heirs and assigns, that he, the said C. C. and his heirs, shall and will, on or before the _____ day of _____, 192—, make out a complete title in fee-simple to, and by such conveyances, ways and means in law, as the said D. D., his heirs and assigns, or his or their counsel learned in the law, shall reasonably devise, advise, or require, convey, release, and assure in possession and enjoyment, to the said D. D., and his heirs or assigns forever, free from all manner of incumbrances, claims and demands whatsoever, and with usual and proper covenants of title, all that tract or parcel of land,

with its appurtenances, lying, etc. (describe the land as definitely and particularly as may be).

And the said D. D., in consideration of the covenants and agreement hereinbefore contained, on the part of the said C. C., doth, for himself and his heirs, covenant and agree with the said C. C., that the said D. D., and his heirs and assigns, shall and will, upon the making and executing of such conveyances and assurances as aforesaid, pay to the said C. C. or his assigns, the sum of _____ dollars in gold.

This agreement is signed in duplicate, each party holding a copy.

Witness the hands and seals of the said parties, the day and year first above written.

C. C. (SEAL.)

D. D. (SEAL.)

No. 4. OPTION CONTRACT FOR THE PURCHASE OF LAND

Know All Men By Presents, That I, A. B., in consideration of the sum of \$1.00 to me in hand paid, the receipt whereof is hereby acknowledged, do hereby grant to W. D. H. & Co., or their assigns, the option or privilege to purchase my tract of land containing _____ acres, situated [here briefly describe the land] at any time within _____ months, from the date hereof, at the price of \$_____, to be paid one-third in cash, the residue upon a credit of one, two and three years, the deferred payments to be evidenced by bonds payable on or before 1, 2 and 3 years from day of sale, and bearing interest from date of sale at the rate of six per cent per annum, said bonds to be secured by deed of trust on the entire property. And in case this option is availed of I agree to convey said property to the said W. D. H. & Co., or their assigns, by proper deed with general warranty clear of all liens and encumbrances, and to furnish to them an abstract of title showing the title to said land to be good and clear.

Witness my hand and seal, this the _____ day of _____, 192—.

A. B. (SEAL.)

No. 5. CONTRACTS FOR BUILDING HOUSES.—[See Nos. 1 to 3, under *Architect and Builder*.]

No. 6. AGREEMENT WITH A CLERK

It is agreed this _____ day of _____, 192—, between C. C. and D. D., both of the city of _____, and the State of _____, in manner following, to-wit: The said D. D. covenants and agrees faithfully, truly and diligently to write for and act as the clerk and salesman of the said C. C. for the space of one year from the date hereof, if so long both parties live, without absenting himself from the same; during which time the said D. D. will resort to the office, store, or place of business of the said C. C., and there attend, and do and perform all the duties and offices pertaining to the function of clerk and salesman aforesaid, without revealing any of the secrets of the said C. C., his occupation or business.

In consideration of which service, so to be performed by the said D. D., the said C. C. covenants and agrees to find and provide for the said D. D., during the said year, sufficient lodging and maintenance, and to allow and to pay to the said D. D. the sum of _____ dollars, by the year, by four equal quarterly payments, or oftener, if required.

But when and as often as the said C. C. has not writing or other business to keep the said D. D. fully employed, then and so often during such time, it shall be lawful for the said D. D. to do any other business for his own use, on his own account; and if it happen that the said D. D. fall sick, or shall be absent from the place of business and the employment of the said C. C. when he has employment for the said D. D., then such time of absence shall be deducted, allowed for, and made up to the said C. C.

This agreement is signed in duplicate, each party holding a copy.

Witness our hands and seals.

C. C. (SEAL.)

D. D. (SEAL.)

No. 7. AGREEMENT FOR PURCHASE OF GROWING TIMBER

Articles of agreement, made and entered into this _____ day of _____, in the year 192—, between A. B. of the one part, and E. F. of the other part: Witnesseth, that the said A. B. in consideration of the sum of _____, to be paid him by the said E. F. on the _____ day of _____, in the year _____, and of the agreements and covenants hereinafter mentioned, and which the said E. F., his executors, &c., are to observe and perform, doth hereby grant, bargain and sell unto the said E. F., his executors &c., all and singular the timber-trees, and other trees hereinafter mentioned, that is to say: (here describe the trees and their situation), together with full liberty and authority for the said E. F. his servants and workmen, or his agents, to fell the said trees at all reasonable and convenient times, and to place and lay the bark of the oak trees in convenient parts of the premises to dry. And the said trees and wood, with the bark of the oak, and boughs, lops and tops, of the whole of the said trees, to draw, remove and carry off, and take away in shares, in and by the most usual and convenient ways and parcels, at any time on or before the _____ day of _____ next.

And also free liberty and authority to and for the said E. F. his executors, &c., and his and their servants, agents and workmen, and other person or persons, to whom he or they shall sell and retail the said timber and wood, or any part thereof, to dig saw-pits, and break up and saw the said timber in proper and convenient parts of the said premises, in and upon which the said timber and wood stands and grows, at any time before the said _____ day of _____ next, without paying or making any satisfaction to the said A. B., his heirs or assigns, or under-tenants.

And the said E. F. in consideration of the premises, and the bargain and sale of the said trees and bark, made to him as aforesaid, doth, for himself, his heirs, &c., covenant and agree to and with the said A. B., his executors, &c., by these presents, that he the said E. F., his heirs, &c., shall and will pay to the said A. B., his executors, &c.,

the sum of ———, as aforesaid; and also, that he, the said E. F., his executors, &c., shall and will fell, hew and cut down said trees, and remove and take away the same, with the boughs, &c., thereof, within the time before limited and agreed upon for that purpose, and according to the true intent and meaning of these presents; and also shall and will, within ——— months next after the said ——— day of ——— next, at his and their own costs and charges, fill up all such saw-pits as shall, for the purposes aforesaid, have been made by him or his servants, on any of the said lands; and also fence, amend and repair all the hedges and fences in and about the said lands, in all such places as shall be broken, or otherwise damaged or destroyed in felling, hewing or carrying away the said timber, on being allowed wood for that purpose by the said A. B.

This agreement is signed in duplicate, each party holding a copy.

In witness whereof, the said parties to these presents have hereto set their hands and affixed their seals, the day and year first above written.

A. B. (SEAL.)

E. F. (SEAL.)

No. 8. AGREEMENT FOR SALE AND DELIVERY OF PERSONAL PROPERTY

This agreement, made this ——— day of ———, 192—, between A. B., of the first part, and C. D. of the second part, both of the ——— of ———, in the county of ———, and state of ———, Witnesseth, that the said A. B. in consideration of the covenants on the part of the said C. D. doth covenant to and with the said C. D. that he will deliver to the said C. D. at ———, ——— (here insert the article to be delivered), on or before the ——— day of ——— next.

And the said C. D. in consideration of the covenants on the part of the said A. B. doth covenant and agree, to and with the said A. B. that he will pay to the said A. B. at the rate of (here insert price agreed upon), so delivered, immediately after the completion of the delivery thereof.

This agreement is signed in duplicate, each party holding a copy.

Witness the following signatures and seals.

A. B. (SEAL.)

C. D. (SEAL.)

For bill of sale, see under *Bill of Sale*.

For conditional sale of personal property or sale with reservation of title or lien, see *Conditional Sale, etc.*

No. 9. AGREEMENT TO CULTIVATE LAND ON SHARES

This agreement, made this day, of ———, 192—, between A. B., of ———, Virginia, of the first part, and C. D. of ———, Virginia, of the second part.

Witnesseth, that the said A. B. agrees with the said C. D. that he will properly plow, harrow, till, fit and prepare for sowing, all that certain field of ground belonging to the said C. D., which field lies, etc. (here insert description of the field), containing about ——— acres,

and to sow the same with good ———, finding one-half of the seed ——— necessary therefor, on or before the ——— day of ——— next; and that he will at the proper time, cut, harvest and thresh the said ———, and properly clean the same, and deliver the one-half part of the said ——— to the said C. D. at his barn, on his premises, in the town of ——— aforesaid, near his dwelling-house, within ——— days after the same shall have been cleaned; and will carefully stack the one-half part of the straw on the premises of the said C. D. near to his barn aforesaid.

And the said C. D. in consideration of the foregoing agreement, promises and agrees, to and with the said A. B. that he may enter in and upon the said field for the purpose of tilling and sowing the same, and of harvesting the crop; and free ingress and egress have and enjoy for the purposes aforesaid; and that he will furnish to the said A. B. one-half part of the seed ——— necessary to sow the same, on or before the ——— day of ——— next, and permit the said A. B. to thresh, winnow and clean the ——— upon the premises of the said C. D.

This agreement is signed in duplicate, each party holding a copy.
Witness the following signatures and seals.

A. B. (SEAL.)
C. D. (SEAL.)

CONVEYANCE

See Assignment; Assignment for Benefit of Creditors; Bill of Sale; Conditional Sale, or Reservation Lien or Title; Conditions in Conveyance or Will; Contracts; Deed of Trust; Executory Limitations; Fraudulent and Voluntary Conveyances; Landlord and Tenant; Mortgage; Recordation or Registry; Remainder; Reversion; Trusts and Trustees

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- § 19. Construction of deed to person and his "children," "heirs," etc.—see *Remainder*, section 3
- § 20. Conditions in conveyances—see *Conditions in Deed or Will*.
- § 21. Contract to convey land—see *Contracts*
- § 22. Various forms under "Conveyance"

§ 1. What may be conveyed; after acquired property.—Any interest or claim, present or future, in or to real or personal property may be conveyed by deed or will (Code, §§ 5146-7, 5142).

The Revisions of Code 1919 inserted this important section (5202): "When a deed purports to convey property, real or personal, describing it with reasonable certainty, which the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect, as if the title which he subsequently acquires were vested in him at the time of the execution of such deed, and thereby conveyed."

§ 2. How conveyance may be made.—A conveyance is generally made by deed or will. In a deed it is sufficient to use

the word "grant" (Code, § 5161), or (as more commonly) "grant and convey;" or words of bargain and sale; or a covenant, "to stand seized to the use" of another (Code, § 5155).

A deed, stating the parties and consideration and using the word "grant" is construed to include all the estate, right, title, and interest whatever, both at law and in equity, of the grantor in or to the lands mentioned (Code, § 5163).

But in a regular deed, no consideration is necessary as between the parties, but is as to third persons—see *Fraudulent and Voluntary Conveyances*.

It should be observed that a deed (i. e., conveyance under seal) or a will is necessary to convey a fee simple estate, life estate, or a term exceeding 5 years, in lands; for a less interest a conveyance not under seal or a contract of sale is sufficient, but if the contract be "for the sale of real estate, or for the lease thereof for more than one year," the contract or some memorandum or note thereof must be in writing and signed by the party to be charged thereby or his agent (Code, §§ 5141, 5147, 5561 (6)).

§ 3. Release or "quit-claim" deed.—This is a deed whereby one releases or "quit claims" all rights he has in certain lands (see Code, § 5156). This may be by use of this expression: "The said grantor (or *the said* ———) releases to the said grantee (or *the said* ———) all his claims upon the said lands," which the statute (§ 5164) says "shall be construed as if it set forth that the grantor (or releasor) hath remised, released, and forever quitted claim, and by these presents doth remise, release, and forever quit claim unto the grantee, (or releasee) his heirs and assigns, all right, title, and interest whatsoever, both at law and in equity, in or to the lands and premises granted (or released), or intended so to be, so that neither he nor his personal representative, his heirs, or assigns, shall, at any time hereafter, have, claim, challenge, or demand the said lands and premises, or any part thereof, in any manner whatever."

Such a deed is sufficient to convey all one's right, title and interest whether he were at the time in possession or not (95 Va. 62). If the release is not in this statutory form, it may be good as a grant or ordinary deed. (Code, §§ 5146-7).

As a quit-claim deed excludes the idea that the releasor has

a good or even any title, and so contains no covenants of title, its use seems notice to a purchaser of a possibly defective title, so he cannot claim to be a bona fide purchaser (94 Va. 102), though a purchaser from his is not so affected. (2 M's. Real Prop., §§ 1205-11.)

For form of a deed of release, see No. 10, under *Deed of Trust*.

§ 4. Who may make a conveyance.—Negatively, any one, who is not “non compos mentis,”—whose mind is not incompetent,—i. e., any one except minors, the insane or idiot, or drunken persons, or persons under duress, or an alien, enemy. If a minor makes a conveyance it is good, unless repudiated by him upon coming of age, which may be done even though the grantee has meanwhile conveyed to a bona fide purchaser without notice. Repudiation may be (he being of age) by bringing an action of ejectment for the land or a suit to cancel the conveyance, or by making another conveyance to another person (15 Grat. 329, 340; 78 Va. 584); but if he after coming of age, expressly confirms the conveyance, or clearly recognizes it as valid, it stands confirmed. Mere failure to repudiate, unless for the statutory period of limitation is not a confirmation (78 Va. 584; 77 Va. 65). See *Minors, etc.*

Drunkenness renders voidable all contracts and transactions if it deprives the party of his reason or an agreeing mind, or if the other party made him partially drunk though not to the extent of loss of reason, and then took advantage of him.

As to duress, an agreement or conveyance extorted by actual violence, as, any unlawful restraint of the person, or any unlawful privation, as want of food, etc.; or by threats of violence, causing a reasonable fear of life or greivous bodily hurt (more than mere battery), or of imprisonment. A threat to prosecute for felony; a friend or near relative, is not sufficient (79 Va. 465-6), but perhaps a threat to burn one's dwelling would be. (2 M's. Real Prop., §§ 1073-7, 1084.)

A married woman may now contract and convey as if she were unmarried—see *Married Woman's Property and Other Rights*, sections 2 and 4.

A conveyance can be made under a power of attorney by one as attorney in fact; but as he is to execute a writing under seal, the power of attorney must be under seal, i. e., have the words “Witness my hand and seal,” or similar words of ac-

knowledge of the seal. The conveyance ought to be made in the name not of the attorney, but of the land-owner, as, "G by A," or "A for G." By statute (§ 545), however, though the words of conveyance or the signature be in the attorney's name, it is sufficient, if it be manifest on the face of the deed that it should be construed to be the deed of the land-owner. See, also, *Agents and Agency*.

§ 5. To whom property may be conveyed.—To a minor, lunatic, idiot, drunkard, or any other person, except an alien enemy (a foreigner of a country at or in a state of war with us). (2 M's. Real Prop., §§ 1986, 1089.)

It is not necessary for the grantee to sign the deed. His acceptance is sufficient; and if the deed contains covenants or agreements to pay certain notes, he is bound as by a simple contract (101 Va. 663). Also, even where both parties sign, another (as, a remainder man), though not a party, may take an immediate estate or interest in the land, or the benefit of any condition in the deed; and if any covenant or promise therein is made for his benefit, in whole or in part, or made with him and others jointly, whether he is named in the instrument or not, he may sue thereon in his own name, but the covenantor or promisor may make all defenses he may have not only against the covenantee or promisee, but against such beneficiary as well. The holder of a lien on the land which the purchaser promises to pay is an illustration (118 Va. 553).

§ 6. Execution of the deed.—

(1) *Reading, signing, and sealing.*—The grantor should at least have an opportunity to know its contents, if it is not read to him; and then it should be signed, sealed, and delivered.

As to corporations, "seal" includes an impression or stamping upon paper or parchment alone, as well as by a wafer or on wax or other adhesive substance affixed thereto; while in other cases, a scroll affixed by way of seal is as valid as if actually sealed (Code, §§ 5, 5562). For how deeds are executed and acknowledged by corporations see *Corporations*, section 14.

The seal, or scroll by way of seal, must be recognized as a seal, on the face of the instrument, as, "Witness my hand and seal," or "Witness the following signature and seal," or other words of similar import (95 Va. 461; 83 Va. 286; 15 Grat. 108); but an omission of this is cured by the solemn recognition

of the scroll in the acknowledgement (116 Va. 424). A seal or scroll affixed after delivery is not sufficient (107 Va. 184); and probably one scroll to several signatures is not sufficient, where they say "Witness our hands and seals" (8 Grat. 63, 67).

A circle or rectangle of ink, with or without the word "seal" written in it, or the word "seal" affixed to the signature is sufficient scroll or scrawl (2 Leigh. 489; 28 Grat. 628). (2 M's. Real Prop., §§ 1136-9.) In practice, printed or typewritten parenthesis or brackets or braces with "L. s." (the Latin abbreviation for the "place of seal") or "seal" within, are often used in bonds and deeds.

(2) *Delivery of the deed*.—It is necessary to a deed's validity that it be delivered to the grantee or his agent. It takes effect from delivery; prima facie this is the date in the deed or the date of the acknowledgment.

A delivery to a third person unconditionally, without reserving the right to recall it or otherwise to control its use, with direction to deliver after the grantee's death, or upon any certain future event, is sufficient (100 Va. 627); and a subsequent deed to another with full knowledge of the facts is null and void (102 Va. 9).

If there be a delivery, but no subsequent acceptance, or none before some one else acquires for value, a right to the property or to charge it, the deed is not effectual. The delivery may be proved, or it is prima facie presumed, from its execution and acknowledgment, and is conclusively presumed from its registry, if the grantee at its execution or afterwards assents to it (5 Munf. 160; 8 Leigh. 271; 1 Rob. 648; 100 Va. 627).

Re-delivery of a voidable deed (as, where made by an infant or under duress), is invalid, yet re-delivery of a void deed is not sufficient.

Yet a re-delivery will pass after-acquired rights (4 Leigh. 561).

As to conditional delivery or delivery in escrow, as it is called, i. e., delivery of a deed complete on its face to a third person to be delivered to the grantee when certain conditions are complied with, the deed does not operate till the conditions are performed, though the grantee obtains possession of it or the party wrongfully delivers it; but when rightfully delivered, it takes effect from the original delivery, and its effect is not impaired by the death of either or both parties, or by the

grantor becoming insane before the second delivery (103 Va. 762). (2 M's. Real Prop., §§ 1140-44.)

(3) *Acknowledgment and recordation*.—A deed is admitted to recordation upon acknowledgment by the grantor or upon proof by two witnesses (Code, § 5204), who need not sign their names. Acknowledgment or registry is not necessary to the validity of the deed as between the parties, but is as to third persons—purchasers and creditors—see *Acknowledgment and Recordation or Registry*. For execution and acknowledgment by corporations, see *Corporations*, section 14.

§ 7. **Each grantor must be named in deed**.—If there are several grantors, as, husband and wife, or two co-owners, each must be named in the deed; the mere signing by one not so named, will not pass his or her interest. (2 M's. Real Prop., § 1109.)

§ 8. **What interest deed passes**.—A deed purporting to pass a greater interest than the grantor has, conveys such interest as he has (Code, § 5148).

Where a deed or will is without words of limitation, not saying what estate is conveyed, the instrument passes the fee simple or the grantor's or testator's whole estate or interest, unless a contrary intention appears by the deed or will (Code, § 5149).

A conveyance of land, includes all buildings, privileges and appurtenances. For what "land" includes, see *Real Estate*, section 1.

§ 9. **Description of property conveyed**.—The property must be described with sufficient accuracy to identify it; otherwise it is void for vagueness and indefiniteness (90 Va. 839), especially as to subsequent purchasers for value and without notice (107 Va. 178; 103 Va. 551; 102 Va. 405; 100 Va. 481; 98 Va. 26); and if the description is so vague and uncertain as not to be self-explanatory, while the burden rests upon the grantee to show to what it applies (107 Va. 178), yet in the absence of such evidence the grantor is favored with the benefit of any reasonable doubt (104 Va. 475; 101 Va. 79; 13 Grat. 587).

The most usual method of description is: (1) *By reference to plot or map or streets and number*.—Reference to a plot or map makes it a part of the conveyance (106 Va. 407). Provision is made for recording such plot (Code, §§ 5217-22).

Though reference to street and number should not be relied on alone.

(2) *By monuments, courses, and distances, or "mates and bounds."*—If the calls for the monuments and that for courses and distances conflict, the fixed monuments usually have preference (60 S. E. 633; 106 Va. 407), but the court will look to the intention of the parties (105 Va. 807-8), as also where there is a conflict between the distance of one line and the course of another (105 Va. 807-8; 13 Grat. 468; 10 Grat. 445) but in the absence of any evidence of intention, the course is preferred over the distance (105 Va. 807).

A "monument" may be a river, rock, tree, or other natural object, or a wall, post, ditch, or road. If a corner monument be a structure on adjoining land, the side or edge is meant; but if it be a river, highway, wall, tree, or post, the centre is intended (106 Va. 409; 107 Va. 753).

(3) *By reference to a prior conveyance.*—This is a good mode of description where the land is the same.

(4) *By number of acres.*—This method, where conflicting, gives way to the others (106 Va. 701; 99 Va. 700). (2 M's. Real Prop., §§ 1147-54.)

§ 10. Personal covenants of title.—These personal covenants, borrowed from England, and usually called "modern English covenants of title," are: (1) *That the grantor is seized in fee simple of the land.*—This means the grantor has or owns the estate which he purports to convey. But the covenant is not broken by liens or encumbrances on the land, or even by a contingent dower. The covenant is broken, if at all, as soon as made, and the grantor is not responsible to the grantee's assignee, but only to the grantee himself, for broken covenants do not run with the land. The damages for covenant of seisin broken, are not necessarily the consideration paid, but are to be measured by the actual loss sustained, so if the covenantor corrects the defect in title before injury results, the damages are only nominal (99 Va. 559). (2 M's. Real Prop., §§ 1121-3.)

(2) *Covenant of "right to convey."*—By section 5174 of the Code: "A covenant by the grantor in a deed for land, 'that he has the right to convey the said land to the grantee,' shall have the same effect as if the grantor had covenanted that he has good right, full power, and absolute authority, to convey the said land, with all the buildings thereon, and the privileges

and appurtenances thereto belonging, unto the grantee, in the manner in which the same is conveyed or intended so to be by the deed, and according to its true intent."

This is about the same as the covenant of seisin; but where the conveyance is under a power of appointment (see *Powers*), the latter would not be appropriate. (2 M's. Real Prop., § 1124.)

(3) *Covenant for "quiet possession;" "free from encumbrances;" and of "no act to encumber."*—By section 5175 of the Code: "A covenant by any such grantor, 'that the grantee shall have quiet possession of the said land' shall have as much effect as if he covenanted that the grantee, his heirs, and assigns, might, at any and all times thereafter, peaceably and quietly enter upon and have, hold, and enjoy, the land conveyed by the deed, or intended so to be, with all the buildings thereon and the privileges and appurtenances thereto belonging, and receive and take the rents and profits thereof, to and for his and their use and benefit, without any eviction, interruption, suit, claim, or demand whatever. If to such covenant there be added 'free all encumbrances,' these words shall have as much effect as the words 'and that freely and absolutely acquitted, exonerated, and forever discharged, or otherwise, by the said grantor or his heirs saved harmless and indemnified of, from, and against, any and every charge and encumbrance whatever.' " (Code 1887, § 2450.)

By section 5177: "A covenant by any such grantor 'that he has done no act to encumber the said lands' shall have the same effect as if he covenanted that he had not done or executed, or knowingly suffered, any act, deed, or thing whereby the lands and premises conveyed, or intended so to be, or any part thereof, are or will be charged, affected, or encumbered in title, estate, or otherwise."

The covenant for "quiet possession" is practically identical in effect with the covenant of "general warranty"—see (5), below.

An encumbrance, as here used, embraces any lien, as, mortgage, deed of trust, judgment, attachment, vendor's or mechanic's lien, lien for taxes, etc.; also, private easements, as, right of way, right to maintain a drain, etc., of which the purchaser has no notice, but not natural easements, as, the right of support by adjacent (adjoining) or subjacent (under) land,

or the right to the interrupted flow of a stream; also dower, contingent or vested (but not assigned), but if the dower is assigned or set apart, it is a violation of the covenant of seisin or right to convey.

Of course if the encumbrance is recognized by the parties in advance as being outside the scope of the covenant, it is not a breach, as, a deed of trust where the grantee has not paid the purchase money, it providing for its release to the extent of any amount of purchase money paid (96 Va. 257); or where the grantee assumes the payment of the encumbrance, even though it is not expressly excepted. But the grantee's notice of the encumbrance, does not waive it as a breach, for the grantee may expect the grantor to clear it off before executing the deed or out of the purchase money. (2 M's. Real Prop., §§ 1125-6.) This covenant does not run with the land—see (6), below.

(4) *Covenant for further assurances.*—By section 5176 of the Code: "A covenant by any such grantor 'that he will execute such further assurances of the said lands as may be requisite,' shall have the same effect as if he covenanted that he, the grantor, his heirs, or personal representative, will at any time, upon any reasonable request, at the charge of the grantee, his heirs, or assigns, do, execute, or cause to be done or executed, all such further acts, deeds and things, for the better, more perfectly, and absolutely conveying and assuring the said lands and premises, hereby conveyed or intended so to be, unto the grantee, his heirs, and assigns in manner aforesaid, as by the grantee, his heirs, or assigns, his or their counsel in the law, shall be reasonably devised, advised, or required."

Under this covenant, the grantee may demand only reasonably necessary, not unnecessary or impossible, acts (89 Va. 376). Of course, the grantor, before the grantee has suffered any damage or been disturbed in possession, may supply the missing link in this chain of title, and avoid suit (96 Va. 559). (2 M's. Real Prop., § 1127.)

(5) *Covenant of "general" and "special" warranty.*—By section 5171 of the Code: "A covenant by the grantor in a deed, 'that, he will warrant generally the property hereby conveyed, shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, per-

sonal representatives, and assigns, against the claims and demands of all persons whomsoever."

By section 5172: "A covenant by any such grantor 'that, he will warrant specially the property hereby conveyed' shall have the same effect as if the grantor had covenanted that he, his heirs, and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representative and assigns, against the claims and demands of the grantor, and all persons claiming or to claim by, through, or under him."

By section 5173: "The words 'with general warranty' in the granting part of any deed, shall be deemed to be a covenant by the grantor 'that he will warrant generally the property hereby conveyed.' The words 'with special warranty,' in the granting part of any deed, shall be deemed to be a covenant by the grantor 'that he will warrant specially the property hereby conveyed.'"

These are not "English covenants," but are very popular in Virginia, and often used without the others, though not as broad as they.

The special warranty is confined chiefly to deeds by trustees, commissioners of the court, or other persons acting in a representative capacity. As a covenant of warranty is generally considered the principal covenant in a conveyance, so where a special warranty, is followed or accompanied in the same sentence by other covenants in more general language, all will be considered special, as aimed only against the acts of the grantor himself, or those claiming by, through, or under him (92 Va. 216; 105 Va. 827).

The general warranty is broken where, at the time of the conveyance, the premises are in possession of a third person claiming under a superior title; or where the grantee is compelled by court decree to purchase the adverse claim or to surrender the possession (107 Va. 334-5); but it is not broken by a wrongful disturbance or ousted by a mere stranger under no claim of title, or by a mere trespass by the grantor or a third person.

This covenant does not cover encumbrances (82 Va. 705; 83 Va. 164). (2 M's. Real Prop., §§ 1128-30.)

(6) *Liability of remote guarantors upon personal covenants of title.*—Covenants of seisin (see (1), above), and of

right to convey (see (2), above), and, it seems against encumbrances (see (3), above), are broken when made and do not run with the land; in other cases, covenants of title run with the land, and a remote assignee or grantee may sue for a breach occurring in his time, notwithstanding his immediate grantor has given him covenants of title which are violated by the same eviction or ouster. He may sue either (107 Va. 331). But no owner of land, after parting therewith, can sue a prior grantor, until he has been compelled to pay damages on his own covenants; and in order to sue for re-imbursement, he must ordinarily prove that the evictor had a valid title, unless indeed he notified the more remote grantor of the damage suit against him and requested him to defend it (107 Va. 336).

Neither the grantee nor any subsequent grantee, after parting with the land, can release the covenant, as against a subsequent owner of the land. (2 M's. Real Prop., §§ 1131.)

(7) *Extent or measure of recovery upon personal covenant of title.*—The damages for a breach of a covenant of title are the value of the land at the time of the conveyance, which is usually the price agreed upon, with interest from the date of eviction, and the legal and taxable costs in the action in which eviction occurs; but if no actual loss has been sustained, only nominal damages are recoverable.

In case of a breach of the covenant against encumbrances, the measure of recovery is the amount the grantee has been compelled to pay in order to satisfy the encumbrance, or the loss he has actually sustained by reason of its enforcement, but it must not exceed the total consideration or purchase price actually paid by him. He is also entitled to recover for the amount of the rents and profits he is liable for to the adverse claimant; or, if its value is not known, in lieu thereof interest upon the purchase money or the value of the land, from the time he was responsible for the rents and profits. (2 M's. Real Prop., § 1132.)

As to improvements made by the grantee, for which formerly he was not allowed (2 Rand. 132, 154; 2 Leigh 451; 9 Leigh 101), see the statutes as to allowance for improvements, under title *Improvements*.

(8) *Grantor may set up after-acquired title.*—The grantor may now set up an after-acquired title—see section 1, above.

§ 11. *Effect of warranty upon the heirs.*—By section

5148 of the Code, if the deed mentions that the grantor and his heirs will warrant what it purports to pass, if anything descends from him, his heirs shall be barred for the value of what is so descended, or liable for such value.

This refers to real estate descending, not to personal assets, nor to real or personal estate coming from the warrantor by will.

The statute abolishes collateral warranty,—i. e., a warranty that descends not in the same line with the land warranted, but from a different ancestor, since it makes the heirs responsible upon the ancestor's warranty only to the extent of assets descended from him, and not from another ancestor (5 Grat. 64, 77, 83; 2 Rand. 549).

Also, as to lineal warranty—that warranty which descends in the same line with the land warranted, that is, in the same line the land would have descended, whether the descent be lineal or collateral.—this statute effected two changes: (1) At common law, the heir had to make the warranty good in other lands, but now he is bound only to the extent of the real assets descended from the warrantor; (2) he is barred for the value of what is descended from the ancestor, so if nothing descends from him, he is not barred at all, and may assert a claim against the land conveyed. (2 M's. Real Prop., §§ 1114-16.)

§ 12. When personal covenants run with the land.—If the covenant does not affect the nature, quality, or value of the land conveyed, it does not run with the land, and so does not benefit or charge the assigns (assignees), even though the assigns be specially mentioned; as, where the covenants relate to another trust.

Covenants running with the land are those affecting the nature, quality, or value of the land conveyed, and they bind the assigns, though they be not expressly named; but an assignee is bound only during his occupancy or interest in the land, while the liability of the lessee or grantee himself may continue indefinitely, being expressly undertaken. If, however, the covenant in a lease relates to a thing not in existence, as, to build a wall on the land, the covenant is not binding on an assignee unless expressly named; but by statute (§ 5170), the word in a deed, "the said ——— covenants" has the same effect as if the assigns were expressly mentioned. For the

general law as to covenants running with the land in deeds and leases, see *Landlord and Tenant*, section 5, (8).

As to conveyances of the fee simple, the benefits of covenants running with the land, they pass with the land, and the purchasers may sue if the covenant be violated; as to burdens, it seems they do not pass, except, a court of equity may uphold them if they create a servitude, easement, or trust (81 Va. 553; 92 Va. 295). (2 M's. Real Prop., §§ 1117-20.)

The most important covenants in fee simple conveyances, are those relating to title—see section 10, above.

§ 13. Consideration of a deed.—As between the parties, no consideration is necessary; but it is, as to existing creditors—see *Fraudulent and Voluntary Conveyances*.

§ 14. Recordation of a deed, and its effect.—Recordation of a deed is not necessary as between the parties; but it is “void as to purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record,” in the county or city where the property is: and “the mere possession of real estate shall not of itself be notice to purchasers thereof for value of any interest or estate therein of the person in possession” (Code, § 5194, as amended by Acts 1922.) A recordation under this section is not to effect the rights of a creditor as to a factor, agent, etc., doing business as a trader, and not disclosing name of principal by a sign and a notice in a paper, or doing business in his own name (Code, § 5194, as amended by Acts 1922), and § 5224).

“Creditors” here do not embrace general, but only lien creditors (as, by judgment, attachment, deed of trust, etc.), whether with or without notice, and whether prior or subsequent, including also claims for torts (or wrongs), as, for adultery, seduction, slander, and assault and battery (76 Va. 587). If a general “creditor” takes a deed of trust or mortgage, he is no longer considered a creditor, but is in law a “purchaser.”

By section 5200 of the Code “creditors” are not restricted to creditors of the grantor, but embraces all creditors who, but for the deed or writing would have had a right to subject the property to their debts (6 Grat. 154; 23 Grat. 737; 100 Va. 101).

As to who are “purchasers,” a creditor taking a lien, as

stated above, or taking a conveyance in payment of a pre-existing debt, is a purchaser (2 Leigh. 84; 13 Grat. 437; 15 Grat. 153; 30 Grat. 297). But one buying at a judicial sale for the benefit of a creditor, is not a purchaser, but simply succeeds to the rights of the creditor.

Section 5200 also provides that "purchasers" are not restricted to purchasers of the grantor, but embraces all purchasers, who, but for the deed or writing, would have had title to the property, or a right to subject it to their debt; and the purchaser protected is the "complete purchaser," i. e., one who has paid all the consideration (not merely secured it to be paid) and has acquired his conveyance (or at least the right to call for it) before notice of the prior unregistered conveyance or encumbrance (75 Va. 949, 956-7; 79 Va. 147; 102 Va. 314; 105 Va. 749). Section 5200 further provides: "And as against any person claiming under a deed or other writing which shall not have been admitted to record before payment by a subsequent purchaser for valuable consideration of the whole or a part of his purchase money, such a subsequent purchaser, notwithstanding such deed or other writing be admitted to record before he becomes a complete purchaser, shall, in equity, have a lien on the property purchased by him, for so much of his purchase money as he may have paid before notice." This statute does not seem to apply if the subsequent purchaser obtains notice otherwise than by its tardy admission to record.

By section 5201, it is provided that a purchaser shall not be "affected by the record of a deed or contract made by a person under whom his title is not derived; nor by the record of a deed or contract made by any person under whom the title of such purchaser is derived, if it was made by such person before he acquired the legal title of record."

The subsequent purchaser, to be protected, must be without notice, which may be either actual notice, as where he knows of the existence of the adverse claim, or, perhaps, where he is conscious of having the means of knowledge, and yet does not use them, and it matters not whether his knowledge results from direct information or is gathered from facts and circumstances; or "constructive notice," or that notice which the law imputes in certain cases,—as, where the subsequent purchaser has actual notice of an encumbrance, etc., is charged with notice of all facts and instruments to which an examination of the encum-

brance, etc., might have led him; or where he has designedly abstained from inquiry to avoid notice, or perhaps where he is guilty of gross negligence in omitting such inquiry; or where his attorney or agent, has notice, or where the prior claim or incumbrance depends upon a public act of the legislature: or where prior claim has been duly recorded. (2 M's. Real Prop., §§ 1404-13.)

§ 15. Fraud in execution or procurement of conveyance.

—Fraud in the execution of a deed may be proved; as, where it is misread, or the grantor is induced to sign one instrument, thinking it another; and while the usual relief is in a court of equity to set aside the deed, by section 6145 of the Code, in an action on a contract (as, on purchase money, notes or bonds), the defendant may file a special plea of set-off, alleging, among other things, fraud in its procurement, or any such matter existing before its execution as would entitle him to damages at law or relief in equity—see *Set-off*.

Fraud in the procurement of the deed will render it invalid; as, by actual fraudulent representations or concealments, or by inequitable or unconscionable bargains, or by fraud presumed from the circumstances and condition of the parties.

Even in judicial sales, if it appears there has been any injurious misrepresentation, fraud, or mistake, the biddings will be re-opened and the property re-sold (28 Grat. 49; 79 Va. 590; 80 Va. 359; 82 Va. 580; 83 Va. 490; 85 Va. 403; 97 Va. 364).

Mere inadequacy of price alone is not sufficient to set aside a deed, but that with imposition, mutual mistake, or standing in a relation of influence, may readily make a case of fraud (3 Leigh 567; 9 Grat. 330; 78 Va. 69; 79 Va. 382; 81 Va. 524; 84 Va. 87); or if the price is so grossly insufficient as to shock the conscience, it alone constitutes fraud (2 Leigh 149; 13 Grat. 495; 19 Grat. 74, 107; 26 Grat. 470, 474; 100 Va. 638).

Weakness of mind, with inadequate consideration, undue influence, surprise, or the like, may make a case of fraud; and where improper advantage is taken, in case of persons standing in confidential relations, as, parent and child, guardian and ward, attorney and client, and trustees, agents, etc., the deed will be set aside (1 Munf. 518; 3 Munf. 232; 2 Leigh 11, 3 Leigh 567; 2 Rob. 294; 1 Grat. 4, 9, 10; 7 Grat. 52; 9 Grat. 330,

333; 11 Grat. 220; 20 Grat. 1, 7; 26 Grat. 152; 29 Grat. 24; 93 Va. 268).

For fraud in the execution of a conveyance as against third persons, see *Fraudulent and Voluntary Conveyances*.

§ 16. When conveyances set aside for mistake.—In the case of plain mistake or misapprehension as to facts, though without fraud, the conveyance will be set aside, if the error is substantial, so that the purchaser does not get what he bargained for, or the grantor conveys what he did not intend to convey; or if the error is not substantial, the court will let the conveyance stand and even up by way of compensation (2 Grat. 266; 3 Grat. 193, 367; 7 Grat. 86; 9 Grat. 277; 10 Grat. 513; 11 Grat. 468; 12 Grat. 628; 16 Grat. 109; 26 Grat. 645). But in the case of sales and conveyances by the court, the general rule is *caveat emptor*, i. e., purchaser be aware (2 Grat. 198; 9 Grat. 358; 13 Grat. 212-13; 28 Grat. 698; 7 Grat. 10-11; 29 Grat. 351; 77 Va. 138; 83 Va. 335).

And this is true as to mistake as to situation, boundary, or quantity of land conveyed; except, of course, where the purchaser clearly intended a purchase of hazard, at a gross price; but "more or less" alone is not enough to show the purchase was not by the acre (26 Grat. 444, 723-4; 10 Grat. 246; 1 Grat. 14; 1 Rob. 287; 5 Leigh 62, 64).

In the case of a compromise of doubtful rights, ignorance of fact is generally no ground for setting a conveyance aside (4 H. & M. 184; 6 Munf. 406; 2 Rand. 442). (2 M's. Real Prop., §§ 1184-8.)

§ 17. Alteration of deeds.—No erasure, interlineation or other alteration in a deed, nor even its destruction by either party, nor even its cancellation by mutual consent can affect the validity of a deed of lands duly made and delivered, for such conveyance for an estate exceeding 5 years can only be by deed or will (which passes the title), and not by alteration or cancellation. Of course, if the alteration makes it impossible to see what the deed was and there is no extrinsic evidence to show it, it may prove fatal to the deed (105 Va. 605; 101 Va. 308; 10 Leigh 57). (2 M's. Real Prop., § 1190.)

For alteration of contracts generally, see *Alteration of Writings*.

§ 18. When loan of personal property over 5 years void, unless by deed or will.—By section 5188 of the Code: "Where

any loan of goods or chattels is pretended to have been made to any person with whom, or those claiming under him, possession shall have remained five years without demand made and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation is pretended to have been made of a use or property, by way of condition, possession whereof shall have so remained in another as aforesaid, the absolute property shall be taken to be with the reversion, remainder, or otherwise, in goods or chattels, the possession, and such loan, reservation, or limitation void as to creditors of and purchasers from the person so remaining in possession, unless such loan, reservation, or limitation be declared by will, which or a copy of which is, or by deed, or other writing, duly admitted to record within the said five years in the county or corporation in which said goods or chattels may be."

§ 19. Construction of deed to person and his "children," "heirs," etc.—See *Remainder*, section 3.

§ 20. Conditions in conveyances.—See *Conditions in Deed or Will*.

§ 21. Contract to convey land.—See *Contracts*.

§ 22. Various forms under "Conveyances."

No. 1. STATUTORY FORM OF DEED, WITH COVENANTS

(Code, §§ 5162-4, 5168-76.)

This deed, made the _____ day of _____, in the year, 192—, between P. P. and D. D., witnesseth: that in the consideration of (here state the consideration), the said P. P. doth grant unto the said D. D., with general (or *special*) warranty, all that certain tract or parcel of land, lying (here describe the property with reasonable particularity; and insert any, all or none of the following covenants, as the parties may have agreed on):

And the said P. P. covenants that he has a right to convey the said land to the grantee; that he has done no act to encumber the said land; that the grantee shall have quiet possession of the said land, free from all encumbrances; that he will execute such further assurances of the said land as may be requisite. Witness the following signature and seal.

P. P. (I. S.)

In a quit-claim deed, or the above deed, it is a sufficient release to say: "The said grantor (or *the said Q. O.*) releases to the said grantee (or *the said D. D.*) all his claim upon the said land."

No. 2. MORE COMPREHENSIVE FORM
(Tate's Forms, p. 141; 4 Min. Inst. 1596.)

This indenture, made this _____ day of _____, in the year of our Lord 192—, between C. C., of _____, and E., his wife, of the one part, and D. D., of _____, of the second part—**WITNESSETH:** That the said C. C. and E., his wife, for and in consideration of the sum of _____ dollars to them in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, release and confirm to the said D. D., and his heirs and assigns forever, all of that certain tract or parcel of land lying in _____, and containing by estimation (or *by recent survey*) _____ acres, be the same, however, ever so much more or less, and bounded as follows, to-wit: Beginning at (describe the boundaries of the land). Together with all the appurtenances to the said land belonging or in any wise appertaining. To have and to hold the said tract or parcel of land, with its appurtenances aforesaid, unto the said D. D., his heirs and assigns forever.

And the said C. C., for himself and his heirs, doth covenant and agree with the said D. D., his heirs and assigns, in manner and form following, to-wit:

That is said C. C. (or *the said C. C. and E., his said wife*), is (or *are*) seized in fee-simple (or *seized in fee-simple in right of the said E., or that the said E., is seized in fee-simple*), of the said tract or parcel of land, with its appurtenances aforesaid.

That the said C. C. and E., his wife, have good right and lawful power to convey the said tract or parcel of land, with its said appurtenances, to the said D. D. in fee-simple.

That the said D. D. and his heirs and assigns, shall have quite and peaceable possession of the said land, and its appurtenances aforesaid, forever.

That the said tract or parcel of land, with its appurtenances aforesaid, is free from all incumbrances and charges whatsoever; and

That the said C. C. and E., his wife, will execute such further assurance of and for the said land, and its appurtenances, as may be requisite to make the title thereto of the said D. D., his heirs and assigns, sure and complete forever.

Witness the hands and seals of the parties, the day and year first above written.

C. C. (SEAL.)

E. C. (SEAL.)

No. 3. CONVEYANCE OF LAND BY EXECUTRIX
(Tate's Forms, p. 141; 4 Min. Inst. 1599.)

Whereas, C. C., late of _____, now deceased, was in his life-time lawfully seized in fee-simple of a certain tract or parcel of land lying in _____, and containing, by recent survey, _____ acres, and bounded as follows: Beginning at, etc. (describe the land), which said land was conveyed to the said C. C. in his life-time by R. S., of _____, by deed bearing date of _____ day of _____, in the year 192—, as by the said deed, of record in the _____ court of _____ county (or

corporation) of ———, will more fully appear. And whereas the said C. C., by his last will and testament in writing, bearing date on the ——— day of ———, in the year 192—, and duly proved and recorded in the ——— court of the ——— of ———, did will, devise and direct that all his just debts should be paid, and then that the remainder of his estate, both real and personal, should be and pass in fee, and in absolute property, to P. C., then the wife, and now the widow of the said C. C.; and did, by the said will, constitute and appoint the said P. C., the sole executrix thereof, as by the said will, reference being thereto had, will more fully appear. And whereas the said P. C. has found it necessary, in order to pay off and discharge the debts and demands against the estate of her said decedent, to sell the said land.

NOW THIS DEED WITNESSETH: That the said P. C., as executrix, widow and residuary legatee of the said C. C., deceased, for and in consideration of the premises, and for the further consideration of ——— dollars, to her in hand paid by D. D., at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth by these presents, grant, bargain, sell, release, assign and confirm, by virtue of the power and authority on her conferred by virtue of the said will of the said C. C., unto the said D. D., and his heirs and assigns forever, all of the above described tract or parcel of land, together with the privileges and appurtenances thereunto belonging; and doth remise, release, and forever quit claim and grant unto the said D. D., and his heirs and assigns, all the right which the said P. C. hath to dower in the aforesaid conveyed premises, whereof her husband, the said C. C., died seized, and also all her estate and interest therein, as the residuary devisee thereof, under the will of the said C. C., to have and to hold the said tract or parcel of land, with its appurtenances aforesaid, unto the said D. D., and his heirs and assigns forever.

And the said P. C. doth, for herself and her heirs, covenant and agree with the said D. D., and his heirs and assigns, that she hath not done, nor suffered to be done, any act, matter or thing, to incumber or in any wise charge the said tract or parcel of land, and that the said D. D., and his heirs and assigns, shall henceforth have and quietly enjoy the said tract or parcel of land, and its appurtenances, free from all claims and demands made or set up thereto by the said P. C., or any person or persons claiming by, through, or under her.

Witness the hand and seal of the said P. C., this ——— day of ———, in the year of our Lord 192—.

P. C. (SEAL.)

NO. 4. CONVEYANCE OF LAND SOLD UNDER DECREE OF COURT

(Tate's Forms, 162; 4 Min. Inst. 1603.)

This indenture, made this ——— day of ———, in the year of our Lord 192—, between C. C., of ———, of the first part, and D. D., of ———, of the second part; Whereas on the ——— day of ———, in the year 192—, it was decreed and ordered by the ——— court of the ——— of ———, in a certain cause then depending on the chancery

side of the said court, between A. L. and C. L., complainants, and G. S. and L. S., defendants, that the said C. C., who was thereby appointed commissioner for the purpose, should, at public auction, upon the following terms, to-wit: One-half of the purchase money to be paid in cash, the remainder to be paid in twelve months, the payment thereof to be secured by bond or bonds, with good personal security, besides reserving the title until payment, make sale of a certain tract or parcel of land, lying and being in (describe the land by its locality), having first advertised the time, terms, and place of sale for the period of _____, in some newspaper published in _____, and on receiving the whole of the purchase money, that the said C. C., commissioner as whole of the purchase money, that the said C. C., commissioner as aforesaid, should convey the said tract or parcel of land to the purchaser or purchasers thereof in fee simple. And whereas the said C. C., commissioner as aforesaid, in pursuance of the said decretal order, did on the _____ day of _____, in the year 192—, on the premises, offer for sale, at public auction, the tract or parcel of land aforesaid, mentioned and described in the complainant's bill in the said cause; having in pursuance of the said decretal order, advertised the time, terms and place of sale, in the _____, a newspaper published in _____, for the period of _____, as will appear by a certificate of R. E., the editor or the said paper, filed with a report made by the said court of the proceedings of the said commissioner, at which sale the said tract or parcel of land was struck off to the said D. D. for the sum of _____ dollars, that being the highest bid for the same. And whereas the whole of the purchase money has been paid, according to the said decretal order.

NOW THIS INDENTURE WITNESSETH: That the said C. C., commissioner as aforesaid, in order to carry into effect the said sale made as aforesaid, in pursuance of the said decretal order, in consideration of the premises, and of the said sum of _____ dollars, to him in hand paid by the said D. D., agreeably to the terms of the said decretal order, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth give, grant, bargain, sell and convey unto the said D. D., his heirs and assigns for ever, the said tract or parcel of land, with its appurtenances, situate and lying in _____, it being the same land that was conveyed to _____ by _____, by deed bearing date the _____ date of _____, in the year 192—, and of record in the clerk's office of the _____ court of the _____ of _____, to which deed reference is hereby made for a more particular description of the premises. And the said C. C., commissioner as aforesaid, the title to the said tract or parcel of land against himself and his heirs, and all persons claiming by, through or under him, will for ever warrant and defend.

Witness the hands and seals of the parties, the day and year first above written.

C. C. (SEAL.)

D. D. (SEAL.)

No. 5. CONVEYANCE OF LAND SOLD UNDER DEED OF TRUST
[See No. 4, under *Deed of Trust*.]

No. 6. "TAX TITLE" DEED.—[See No. 1, under *Delinquent Tax Sales*.]

No. 7. DEED OF PARTITION.—[See No. 1, under *Partition*.]

No. 8. DEED OF RELEASE.—[See No. 10, under *Deed of Trust*.]

CONVICTS

See *Evidence; Pardons; Penitentiary; State Convict Road Force*

- § 1. Transportation to penitentiary.—See Code, § 4948.
 - § 2. Importing convicts.—See Code, § 4709.
 - § 3. Crimes by convicts.—See Code, §§ 5049-52.
 - § 4. Proceedings against convicts.—See Code, §§ 5053-8.
 - § 5. Convict Lime Board.—See Code, §§ 1266-71.
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COPYRIGHTS

See *Labels or Prints; Patents; Trade Marks*

- § 1. What law controls
- § 2. Who may acquire a copyright
- § 3. International copyright relations
- § 4. What may be copyrighted
- § 5. Extent of protection given
- § 6. How copyright secured
 - (1) Works which are to be reproduced or published
 - (2) Works which are not to be reproduced or published
 - (3) Sending the two copies; penalty for failure
- § 7. Copyright notice; form
- § 8. Term of copyright; renewal; assignment
- § 9. Infringement of copyright; damages
- § 10. Other matters

§ 1. What law controls.—Congress has control of copyright matters (U. S. Const., Art I., § 8, cl. 8). The present copyright law is embodied in Act of March 4, 1909 (which went into effect July 1, 1909), a copy of which, with forms of application and affidavit may be had from the Register of Copyrights, Washington, D. C.

Section 2 of the Act provides that it shall not annul or limit any common law right to copyright (which protected only the first publication). Most every one will avail himself of the Act, rather than rely upon the rather hazy right of common law copyright.

§ 2. Who may acquire a copyright.—Any author or proprietor of any work made the subject of copyright, his executor, administrator, or assigns (or assignees), who is a citizen of this country; or a foreigner domiciled here at the time of the first publication of his work, or foreigners in countries extending to their citizens and us equal copyright privileges. (Copyright Act, §§ 1, 8.)

§ 3. International copyright relations.—Copyright is not secured in foreign countries by action in the Copyright Office, but only by complying with the legislation of such countries.

Copyright treaties have also been entered into with the following foreign countries by proclamation of the President: Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and the British possessions, Italy, Luxemburg, Mexico, Netherlands and possessions, Norway, Portugal, Spain, Sweden, Switzerland, Tunis.

Copyright proclamations have been issued under the Act of 1909, securing copyright control of mechanical musical reproduction in the U. S. to citizens or subjects of Australia, Belgium, Cuba, France, Germany, Great Britain, Italy, Luxemburg, New Zealand and Norway. The convention with Hungary includes such protection.

Copyrights treaties have also been entered into with China, Japan and Hungary (the latter in effect on October 16, 1912). The Copyright Convention of Mexico of 1902 has been ratified by the United States and is effective from July 1, 1908, as between the United States and Costa Rica, Guatemala, Honduras, Nicaragua and Salvador. The Pan-American Copyright Convention signed at Buenos Ayres in 1910 was proclaimed July 13, 1914, and is effective as between the United

States and Bolivia, Brazil, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Nicaragua, Panama, and Salvador.

§ 4. What may be copyrighted.—The Act says, “All the writings of an author,” covering everything Congress can protect under the Constitution—the broadest act we have ever had. These “writings of an author” embrace, among others, the following:

(a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations; (b) periodicals, including newspapers; (c) lectures, sermons, addresses, prepared for oral delivery; (d) dramatic or dramatico-musical compositions; (e) musical compositions; (f) maps; (g) works of art; models or designs for works of art; (h) reproductions of a work of art; (i) drawings or plastic works of a scientific or technical character; (j) photographs; (k) prints and pictorial illustrations; (l) motion-picture photoplays; (m) motion pictures other than photoplays; (n) compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter.” (Copyright Act, § 5 (as amended 1912), and § 6); or (o) anything else that can be reasonably construed as the “writing of an author.”

Under the rules and regulations for the registration of claims to copyrights, promulgated by the copyright office, the following items of the above enumeration are amplified as follows:

(a) *Books.*—This term includes all printed literary works (except dramatic compositions) whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, cord, or single page. The term “book” as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables; interest, cost, and wage tables, etc., single poems, and the words of a song when printed and published without music; librettos; descriptions of moving pictures or spectacles; encyclopædias; catalogues; directories; gazetteers and similar compilations; circulars or folders containing information in the form of reading matter

other than mere lists of articles, names and addresses, and literary contributions to periodicals or newspapers.

The term "book" can not be applied to—

Blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum books, diaries or journals, bank deposit and check books, forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness and not in their merit as literary compositions; directions on scales, or dials, or mathematical or other instruments; puzzles; games; rebuses; labels, wrappers; formulæ on boxes, bottles, and other receptacles of articles for sale or meant to accompany such articles; advertisements or catalogues which merely set forth the names, prices, and places where articles are for sale; prefaces or other inductive matter to works not themselves entitled to copyright protection, such as blank books; calendars are not capable of registration as such, but if they contain copyrightable reading matter or pictures they may be registered either as "books" or as "prints" according to the nature of the copyrightable matter.

(b) *Periodicals*.—This term includes newspapers, magazines, reviews, and serial publications appearing oftener than once a year; bulletins or proceedings of societies, etc., which appear regularly at intervals of less than a year; and, generally, periodical publications which would be registered as second-class matter at the postoffice.

(c) *Lectures, sermons, addresses*, or similar productions, prepared for oral delivery.

(d) *Dramatic and dramatico-musical compositions*, such as dramas, comedies, operas, operettas and similar works. The designation "dramatic composition" does not include the following: Dances, ballets, or other choreographic works; tableaux and moving picture shows; stage settings or mechanical devices by which dramatic effects are produced, or "stage business;" animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; descriptions of moving pictures or of settings for the production of moving pictures. (These, however, when printed and published, are registrable as "books.") Dramatico-musical compositions) include princi-

pally operas, operettas, and musical comedies, or similar productions which are to be acted as well as sung. Ordinary songs, even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas, should be registered as musical compositions, not dramatico-musical compositions.

(e) *Musical compositions*, including other vocal and all instrumental compositions, with or without words. But when the text is printed alone it should be registered as a "book," not as a "musical composition." "Adaptations" and "arrangements" may be registered as "new works" under the provisions of section 6. Mere transpositions into different keys are not expressly provided for in the copyright act; but if published with copyright notice and copies are deposited with application, registration will be made.

(f) *Maps*.—This term includes all cartographical works, such as terrestrial maps, plats, marine charts, star maps, but not diagrams, astrological charts, landscapes, or drawings of imaginary regions which do not have a real existence.

(g) *Works of art*.—This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.) Productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented. No copyright exists in toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or any similar articles.

(h) *Reproductions of works of art*.—This term refers to such reproductions (engravings, woodcuts, etchings, casts, etc.) as contain in themselves an artistic element distinct from that of the original work of art which has been reproduced.

(i) *Drawings or plastic works of a scientific or technical character*.—This term includes diagrams or models illustrating scientific or technical works, architects' plans, designs for engineering work, etc.

(j) *Photographs*.—This term covers all positive prints from photographic negatives, including those from moving-picture films (the entire series being counted as a single photograph), but not photogravures, half-tones, and other photo-engravings.

(k) *Prints and pictorial illustrations*.—This term com-

prises all printed pictures not included in the various other classes enumerated above. Articles of utilitarian purpose do not become capable of copyright registration because they consist in part of pictures which in themselves are copyrightable, e. g., puzzles, games, rebuses, badges, buttons, buckles, pins, novelties of every description, or similar articles. Postal cards can not be copyrighted as such. The pictures thereon may be registered as "prints or pictorial illustrations" or as "photographs." Text matter on a postal card may be of such a character that it may be registered as a "book." Mere ornamental scrolls, combinations of lines and colors, decorative borders, and similar designs, or ornamental letters or forms of type are not included in the designation "prints and pictorial illustrations." Trademarks can not be copyrighted nor registered in the Copyright Office.

A fair abridgement of any book is considered a new work, as it requires labor and the exercise of judgment; also a composition, the materials of which were produced by another. An article forming a part of an encyclopædia may be copyrighted by itself. There may be a valid copyright in the plan of a book as connected with the arrangement and combination of the material and the mode of displaying and illustrating the subject, although the materials employed and the subject of the work may be common to all other writers. Compilations of railroad time tables, or from voluminous public documents may be copyrighted; also new editions of maps; and legal blanks drawn in pursuance of statutes. No copyright can be secured for the publication of statutes alone, but there may be sufficient skill and judgment displayed in their combination and analysis to entitle the compiler to a copyright. No copyright can be secured in written opinions of courts; they being public documents; but a reporter may copyright the syllabi or head notes, and the statements and arguments of counsel prepared by him, but not in the statement of facts which form the basis of the decision reported. While "dramatic compositions" may be copyrighted, a stage dance telling no story, portraying no character, and depicting no emotion, cannot. Engravings, cuts, prints, and photographs may be copyrighted, and include pictorial illustrations from real life, colored photographs or pictures of natural scenery, and films for moving picture machines, likewise, paintings,

drawings, chromos and chromo-lithographs, though used for gratuitous distribution as an advertisement. (4 Am. L. & Prov. pp. 172-4.)

§ 5. Extent of protection given.—The author or proprietor has the exclusive right to print, re-print, publish, copy, and sell; to translate, dramatize, or “novelize”; to arrange or adapt a musical work; to complete, execute and finish a model or design for a work of art; to deliver or authorize the delivery of a lecture, sermon, address, or similar production, in public for profit; to perform or represent a drama publicly, or to sell any manuscript or any record of a dramatic work not produced in copies for sale, or to make any transcription or record thereof for exhibition, performance, representation, production, or re-production; to perform a musical composition publicly for profit, selling of it or its melody in any system of notation or form of record, except that the protection covers only such parts of instruments serving to reproduce the musical work mechanically (i. e., phonographic, rolls and discs, perforated rolls, metal discs, etc.) as produce compositions published and copyrighted after the Act went into effect (July 1, 1909). The Act does not protect the production of the works of a foreign author or composer whose country does not afford similar protection to us. For further provisions as to conditions of extending the copyright to such mechanical reproductions, payment of royalty, etc., see the Act. (Copyright Act, §§ 1, 2, 3.)

§ 6. How copyright secured.—Write to the Register of Copyrights, Washington, D. C., for blank application and affidavit, with instructions.

(1) *Works which are to be reproduced or published.*—If the work is a book or something of which copies are to be reproduced or published for sale, it is necessary to publish it with the notice of copyright (see section 7, below); and then promptly after publication to send to the Register of Copyrights, Washington, D. C., two copies of the best edition of the work, with the application for registration and a remittance of \$1.00 (except in the case of photographs, for which, if a certificate of registration is not desired, the fee is only fifty cents); and a certificate is sent the applicant. Where several volumes of the same book is deposited at the same time, only one registration, with one fee, is required. (Copyright Act, §§

9, 10, 12, 55.) In the case of books or periodicals, the copies must have been printed from type set in the United States, or from plates made here or by a process wholly performed here, and the entire printing, binding, and preparing of illustrations must have also been performed here; and in the case of books, the copies furnished must be accompanied by affidavit to that effect. (Copyright Act, §§ 12, 15, 16.)

(2) *Works which are not to be reproduced or published.*—If the work is a lecture, photograph, or something of which copies are not to be reproduced or published for sale, copyright is secured by sending to the Register of Copyrights, Washington, D. C., an application on form obtained from him, with the fee of \$1.00, and enclosing therewith;

(a) In the case of lectures or other oral addresses or of dramatic or musical compositions, one complete manuscript or typewritten copy of the work;

(b) In the case of photographs not intended for general circulation, one photographic print;

(c) In the case of works of art (paintings, drawings, sculpture), or of drawings or plastic work of a scientific or technical character, one photograph or other identifying reproduction of the work;

(d) In the case of a motion-picture photoplay, a title and description, with one print taken from each scene or act;

(e) In the case of a motion picture other than a photoplay, a title and description, with not less than two prints taken from different sections of a complete motion picture.

In any such case, however, if the work is later to be reproduced in copies for sale, there must be sent two copies of the best edition of the work as specified above. (Copyright Act, § 11.)

(3) *Sending the two copies; penalty for failure*—The two copies necessary to perfect the copyright may be delivered to a postmaster with a proper request to forward; he will give a receipt for them and will mail them to the copyright office without cost.

Failure to deposit the two copies within three months (six months if from an outlying territorial possession) after notice from the Register of Copyrights is punishable by a fine of \$100, the payment to the Library of Congress of twice the amount of the retail price of the best edition of the work, and

the forfeiture of the copyright. (Copyright Act, §§ 13, 14.)

§ 7. Copyright notice; form.—Upon each copy of the published work there must be inscribed a notice of the copyright; which if a book or other printed publication, should be on the title page or the page immediately following; if a periodical, either on the title page or the first page of the text of each separate number or under the title heading; or if a musical work, either on the title page or the first page of the music. But, one notice in each volume or each number of a newspaper or periodical published is sufficient. (Copyright Act, §§ 9, 18, 19.)

The form of the copyright notice prescribed is as follows:

“Copyright (or, Copr.), 192—, (year date of publication) by—— (name of copyright proprietor).” But in case of copies of works specified in f to k, under section 4, above, the notice may consist of the letter C, enclosed in a circle, accompanied by initials, monograms, mark, or symbol of the copyright proprietor; provided his name appears on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies are mounted. (Copyright Act, §§ 9, 18, 19.)

§ 8. Term of copyright; renewal; assignment.—The term of a copyright is 28 years, and one year before its expiration, it may be once renewed for a further term of 28 years. (Copyright Act, §§ 23, 24.)

A copyright may be assigned, granted, or mortgaged by a writing signed by the proprietor, and may be bequeathed by will. An assignment is void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless recorded in the copyright office within 3 months (6 months. if executed without the United States) after its execution. (Copyright Act, §§ 42 to 44.)

§ 9. Infringement of copyright; damages.—It is an infringement for another to do any of the acts mentioned in section 5, above.

The remedies are in a circuit court for the United States, by an injunction, to restrain the infringement; an action for damages suffered; an order from court requiring all articles alleged to infringe the copyright to be taken and held pending the action, or all the infringing copies or devices, as well as plates, molds, matrices, etc., to be destroyed.

The damages are such as he may have suffered, as well as all the profits which the infringer has made, or in lieu of actual damages and profits, such damages as to the court appears just. And in assessing such damages the court may, in its discretion, allow the amounts stated below except in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed \$200 nor be less than \$50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed \$100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed \$5,000 nor be less than \$250 and such damages shall, in no other case, exceed \$5,000 nor be less than \$250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

The amounts are: (1) In the case of a painting, statue, or sculpture, \$10 for every copy made or sold by, or found in the possession of the infringer or his agent or employees; (2) In the case of any work enumerated in section 4, above, except a painting, statue, or sculpture, \$1.00 for every such copy; (3) In the case of a lecture, sermon, or address, \$50 for every delivery; (4) In the case of a dramatic or dramatico-musical or a choral or orchestral composition \$100 for the first, and \$50 for every subsequent infringement, and in the case of other musical compositions, \$10 for every infringement. (Copyright Act, § 25, as amended 1912.)

But any one who wilfully and for profit infringes any

copyright, or who knowingly and wilfully aids or abets such infringement, is guilty of a misdemeanor, punishable by imprisonment not over one year or fine of \$100 to \$1,000, or by both (Copyright Act, § 28.)

§ 10. Other matters.—For what importation prohibited, see §§ 30 and 31 of the Act; punishment for making false claim of copyright or for fraudulent removal of notice (fine of \$100 to \$1,000), or for exporting or importing articles with false notice of copyright (fine \$100), see § 29.

CORONER'S INQUEST

- § 1. Procedure
- § 2. Expenses and fees
- § 3. Various forms under "Coroner's Inquest"

§ 1. Procedure.—"Upon notice of a sudden, violent, unnatural, or suspicious death," the coroner views the body and makes inquiry into the circumstances of the death, and if he has reasonable ground to believe that the person came to his death by the criminal act of some one, he issues his warrant in form given in the statute, to the sheriff, sergeant, or constable, to summon six jurors to attend at a time and place named, "to inquire, upon the view of the body—, there lying dead, when, how, and by what means, he came to his death. If the six jurors do not attend, the officer or any other person may be required to summon others. An oath, given in the statute, is administered by the coroner, who also may summon witnesses, including physicians, and the evidence is reduced to writing. If the jury, by their inquisition, accuse any one, the coroner forthwith commits him to jail, if present, and if not present, by warrant causes him to be arrested and brought before a justice to be proceeded with as in cases of arrests by a justice. If there be no coroner at hand, or he fails to perform his duty, a justice of the peace may act. The jurors are to be sworn "upon the view of the body," and not otherwise, but they may then be adjourned to a convenient place. Hence, if the body cannot be found, or the remains are too much de-

composed to afford any aid to the inquiry, the coroner has no jurisdiction. The proceeding should usually be public, and may be on Sunday. (Code, §§ 4806-13, 4615-17; 1 Minor. 122-3.)

§ 2. Expenses and fees.—When the deceased is a stranger the coroner should have the body buried and if the coroner certifies he believes the deceased has not sufficient estate in Virginia to pay expenses of burial and of inquest, they are paid, upon allowance by the court, out of the treasury; but in other cases the charges are paid out of the deceased's estate, or if the estate be insufficient, by the county or corporation. In case of a convict in the penitentiary, they are paid out of the treasury upon allowance by the Executive. Jurors receive \$1; a physician is allowed a reasonable compensation; the coroner for viewing the body, whether an inquest be had or not, \$3; but if he be a physician, his fee is \$5, if he actually examines the body; and if he make an autopsy, he is allowed such additional fee as the court may think reasonable; the sheriff, sergeant, or constable, for summoning jury and witnesses, \$1.50.

§ 3. Various forms under "Coroner's Inquest."

No. 1. WARRANT SUMMONING JURY OF INQUEST

(Code, § 4806)

County (or *corporation*) of —, to-wit:

To X. Y., sheriff (*sergeant* or *constable*) of said —:

You are required to summon six jurors of the said —, to attend before me, a coroner of said —, at the dwelling-house of O. R. (or other place), in said —, on — day of —, 192—, at — a. m. (or p. m.), to inquire, upon the view of the body of C. D. (or of a person *unknown*), there lying dead, when, how, and by what means he came to his death

Given under my hand and seal, this — day of — 192—.

R. T., (or J. P., *Acting as*) Coroner [L. s.]

No 2. OATH OF JURORS

(Code, § 4809.)

"You swear that you will diligently inquire, and true presentment make, when, how, and by what means the person whose body here lies dead, came to his death, and return a true inquest thereof, upon your own knowledge and the evidence before you, so help you God."

No. 3. DEPOSITION OF WITNESSES AT A CORONER'S INQUEST
(Code, § 4810.)

Deposition of witnesses taken at the dwelling-house of O. R. (or other place), in the county (or *corporation*) of —, on the — day of —, 192—, before me and my jury of inquest upon view of the body of C. D. (or *of a person to us unknown*), there lying dead.

G. W., being duly sworn, disposes as follows [here state his evidence in his own words as nearly as many be]. G. W.

A. O., being duly sworn, deposes as follows [here state his evidence as above]. A. O.

[And likewise with any other witnesses.]

Subscribed and sworn to before me, R. T., a coroner of the county (or *corporation*) of —, this — day of —, 192—.

R. T., (or J. P., *Acting as*) Coroner.

No. 4. INQUISITION OF THE JURY
(Code, § 4811.)

County (or *corporation*) of —, to-wit:

An inquisition taken at the dwelling-house of O. K. (or other place), in said —, on the — day of —, 192—, before R. T., a coroner of said —, upon view of the body of C. D. (or *of a person to us unknown*), there lying dead.

The jurors, sworn to inquire when, how, and by what means the said C. D. (or *a certain person unknown*) came to his death, upon their oaths do say [here insert when, how, and by what person, means, weapon, or instrument he was killed, and any material circumstances].

In testimony whereof, the said coroner and jurors have hereto set their hands.

R. T., (or J. P., *Acting as*) Coroner.

Jurors.

No. 5. WARRANT OF ARREST OF ACCUSED BY THE CORONER
(Code, § 4813.)

County (or *corporation*) of —, to-wit:

To X. Y., constable (or *sergeant*) of said —:

Whereas, by an inquisition taken before me, one of Commonwealth's coroners of the said —, this — day of —, 192—, in the said —, on view of the body of C. D., then and there lying dead, one O. S. stands charged with the murder (or *manslaughter*) of the said C. D.:

These are, therefore, by virtue of my office as coroner, to command you, in the name of the Commonwealth of Virginia, forthwith to apprehend the said O. S., and him without delay carry before some one

of the justices of the said —, that he may be dealt with according to law; and for so doing this is your warrant.

Given under my hand and seal, this — day of —, 192—.

R. T., (or J. P., Acting as) Coroner [L. s.]

**No. 6. CERTIFICATE THAT THE DECEASED IS A STRANGER WITHOUT
EFFECTS IN VIRGINIA
(Code, § 4814.)**

County (or corporation) of —, to-wit:

To the county (or corporation) court of said —:

I, R. T., a coroner of the said —, who sat on an inquisition, held on the — day of —, 192—, in said —, in view of the body of C. D., deceased, do hereby certify that the said C. D. is a stranger, and not a resident of said —, and that he has not, as I verily believe, sufficient estate in Virginia to pay the coroner's fees and the expenses of the said inquisition and of the burial of the said C. D.

Given under my hand this — day — of 192—.

R. T., (or J. P., Acting as) Coroner.

CORPORATION COURTS

(See Burks' Pleading & Practice (new ed.), title *Courts*)

See *Courts of Richmond, Norfolk, and Roanoke*

§ 1. Special chapter as to.—See Code, §§ 5905-11, and Acts 1920, p. 607, amending § 5911. For jurisdiction where there are two corporation courts, see Acts 1922.

§ 2. General provisions as to courts.—See *Courts (General Provisions as to)*.

3. *Jurisdiction of "moot" questions*—see *Circuit Courts*, section 3.

CORPORATIONS

See *Banks and Banking; Building and Loan and Industrial Loan Associations; Canals and Canal Companies; Common Carrier; Eminent Domain; Express Company; Insurance and Insurance Companies; Public Utility Companies; Railroads and Railroad Companies; State Cor-*

poration Commission; Steamships and Steamboats; Telegraph and Telephone Companies; Turnpike and Turnpike Companies.

- § 1. Definition of "corporation"
- § 2. Different kinds of corporations
- § 3. Advantages of incorporating
- § 4. How charter for corporation obtained
 - (1st Class) How charter obtained for corporations generally
 - (2nd Class) How charter obtained for co-operative association
 - (3rd Class) How charter obtained for railroad
 - (4th Class) How charter obtained for public service corporation (other than railroad)
 - (5th Class) How charter obtained for non-stock corporation
- § 5. Cost of obtaining a charter
 - (1) General statement as to costs
 - (2) Fees on charters of domestic transportation and transmission companies
 - (3) Fees on charters of other domestic corporations
 - (4) Entrance fees on foreign corporations
 - (5) Fees on charter when amended or enlarged or capital stock increased
 - (6) How fees paid by foreign corporations; no right to conduct business until paid
 - (7) Clerical fees that must be paid on filing certificate of incorporation, etc.
 - (8) Annual registration fee.
 - (9) Annual State franchise tax
- § 6. First meeting of subscribers for organization
 - (1) Items of business
 - (2) Items of the by-laws.
- § 7. First meeting of directors
- § 8. General provisions as to corporations
- § 9. Public service corporations
 - (1) Transportation companies generally
 - (2) Transportation companies as common carriers
 - (3) Transmission companies
 - (4) Public utility companies
- § 10. Foreign corporations
 - (1) Foreign corporation—see section 10, (5), above
 - (2) What foreign corporations must do before transacting business here
 - (3) Entrance fee on foreign corporation
 - (4) Where suits and attachments brought against a foreign corporation
 - (5) On whom and how process or notice served on foreign corporation

- § 11. Where suits and attachments brought against a corporation
 - (1) Foreign corporation—see section 10, (4), above
 - (2) Domestic corporations
- § 12. On whom and how process or notice served on a corporation
 - (5) Foreign corporation—see section 10, (5), above
 - (2) Domestic corporations
 - (a) On whom
 - (b) How service made
- § 13. Executions against a corporation
- § 14. Executions and acknowledgment of writing by a corporation
- § 15. Affidavits by corporations
- § 16. How corporation dissolved
- § 17. Various forms as to "Corporations"

§ 1. Definition of "corporation."—A corporation or "company," includes all chartered organizations, trusts, associations, and joint stock companies having any powers or privileges not possessed by individuals or partnerships, but excludes all municipal (city, town, county, township, etc.) corporations and public institutions owned or controlled by the State (as, the State Board of Education, and the like). (Va. Const., § 153; Code, § 3693.)

§ 2. Different kinds of corporations.—Corporations are public, as, cities, towns, State Board of Education, etc.; or private, which includes all corporations not public, or which do not belong wholly to the public. The legislature may modify or abolish the former, but it can not alter or impair the latter, their charters being private contracts. Private corporations are divided into public service corporations, and those that are not (included in which latter is a third kind, non-stock companies—see below). Public service corporations excludes all municipal corporations and public institutions owned or controlled by the State, and includes all transportation companies (as, a railroad, street railway, electric railway, express or canal company, steamboat or steamship line, freight car company, car association, car service association, or car trust, or any common carrier over a route acquired, wholly or partly, under right of eminent domain or condemnation proceedings); all transmission companies (as, a telegraph or telephone company); all turnpike and other internal improvement companies; public utilities (as, heat, power, light, electric railway, cold storage, viaduct, conduit, bridge, gas, and water companies); and all other corporations authorized to exercise the

right of eminent domain (i. e., to condemn private property for public use), or to use or occupy any street, alley or public highway, whether along or over, or under the same, in a manner not permitted to the general public. (Va. Const., § 153; Code, §§ 3881, 4058.)

Non-stock corporations include colleges, alumni associations, literary societies, cemetery companies, or associations, fraternal benefit associations, fraternal associations, societies or lodges, societies for the prevention of cruelty to children or to animals, charitable or benevolent associations or social, hunting or fishing clubs, or any society or association, or organization of a like or similar nature, in which no capital stock is required, or to be issued. (Code, §§ 3872, 4064.)

§ 3. Advantages of incorporating.—The advantages of corporations beyond ordinary partnership are: (1) any number of persons may unite in an enterprise without inconvenience, contracting, suing and being sued in the corporate name;

(2) A shareholder may put in the undertaking such amount as he wishes, and that is the limit of his liability—no individual or personal liability beyond the obligation to comply with such terms as he may have agreed to in his contract of subscription (Code, § 3788; and

(3) Shares being personal property always, they are susceptible of easy sale and transfer by the holder or his representative (Code, § 3794.) (1 Minor, 549-50.)

§ 4. How charter for corporation obtained.—A private corporation of any kind is created by means of a charter issued by the State Corporation Commission. This charter is a "certificate of incorporation" in some cases or "articles of association" in others, signed, acknowledged, and endorsed by the judge (in some cases), filed and recorded by the incorporators, with an order of the commission attached thereto, authorizing it. There are four chapters of the Code as to the creation of five different classes of corporations, as follows:

(1) Chapter 148 as to general business corporations intended to transact ordinary business, or as legally expressed "corporations other than public service corporations";

(2) The same chapter as to co-operative associations;

(3) Chapter 149 as to railroad corporations, which are one class of public service corporations;

(4) Chapter 150 as to telephone and telegraph companies and the various other public service corporations (see sec. 2, above) other than railroads; and

(5) Chapter 150 as to corporations in which no capital stock is required or is to be issued, called "non-stock corporations".

First Class. How charter obtained for corporations generally.—A corporation of the first class, i. e., corporations other than co-operative, public service and non-stock companies, is created by the following steps: (1) By three or more persons signing and acknowledging a certificate something like this: "This is to certify that we do hereby associate ourselves to establish a corporation under and by virtue of the provisions of chapter 148 of the Code of Virginia 1919, and acts amendatory thereof, for the purposes, and under the corporate name, hereinafter mentioned, and to that end we do, by this our certificate, set forth as follows:" [The certificate then sets forth as follows:]

"(a) The name of the corporation, which name shall contain the word "corporation," or the word "incorporated," and shall be such as to distinguish it from any other corporation engaged in a similar business, or promoting or carrying on similar objects or purposes in this State.

(b) The name of the county (and the postoffice address therein), city or town wherein its principal office in this State is to be located.

(c) The purpose for which it is formed. [The commission instructs that this should be stated clearly, but as the law governing the powers of corporations are very full, complete and controlling, it is rarely necessary to insert provisions as to the powers of the corporation. If in conflict with the statute they are void. When necessary to insert special provisions to cover the rare cases not covered by the statute, they should be prepared by competent counsel familiar with all the provisions of the statute, so as to avoid such conflict. For special object clauses, see section 17, No. 3, below.]

(d) The maximum and minimum amount of capital stock of the corporation, and its division into shares; and if there be more than one class of such stock created by the certificate of incorporation, a description of the different

classes thereof with the terms on which such different classes are created.

(e) The period, if any, limited for the duration of the corporation.

(f) The names and residences of the officers and directors who, unless sooner changed by the stockholders are for the first year to manage the affairs of the corporation.

(g) The amount of real estate to which its holdings at any time are to be limited. .

(h) The certificate shall also contain the information required by section 4202, if the company to be incorporated be an insurance company.

(i) The certificate of incorporation may also contain any provision not contrary to law which the incorporators may choose to insert for the regulation of the business, and for the conduct of the affairs of the corporation; and any provision creating, defining, limiting or regulating the powers of the corporation, of the directors or of the stockholders, or of any class or classes of stockholders."

(2) The second step is the certification by the judge, endorsed on the certificate, as follows:

"Virginia"

"In the Circuit Court of _____county:

"The foregoing certificate for incorporation of the _____ was presented to me, _____, Judge of the _____ Court of the county or city of _____, in term time (or *vacation*), and having been examined by me, I now certify that the said certificate for incorporation is, in my opinion, signed and acknowledged in accordance with chapter 148 of the Code of Virginia 1919, and acts amendatory thereof.

"Given under my hand this _____ day of _____, 192—."

The order to be issued by the commission has been prescribed by the commission and printed in blank, so that the orders may be uniform.

(3) The third step is the payment into the treasury of the charter fee. (Certified check payable to Treasurer of Virginia, can be inclosed with application, direct to the Commission, and proper certificate and receipt will be secured.)

(4) The presentation to the commission of the certificate and the receipt of the Auditor of Public Accounts, for the proper charter fee; certified check for \$5.00, payable to State

Corporation Commission, for seal tax and costs in this office; another, payable to Secretary of the Commonwealth; and still another, payable to proper court clerk, for recordation fees. The commission then issues an order, attached to the certificate, constituting, with the certificate, the charter proper.

(5) The charter is then transmitted to the Secretary of the Commonwealth and recorded in his office.

(6) It is then transmitted by the Secretary of the Commonwealth, by registered mail or personal messenger, to the clerk of the proper court and recorded in that office.

(7) The clerk of the court then returns, by registered mail or personal messenger, the original papers to the office of the Corporation Commission, in which they are preserved. (Code, §§ 3849-51, and Acts 1922, amending § 3851.)

Thus is completed the creation or formation of a corporation of the first class.

For special provisions as to such corporations, see Code, § 3852, as amended by Acts 1920, p. 19; § 3853, and § 3854, as amended by Acts 1922.

Second Class. How charter obtained for co-operative association.—This is obtained like in the first class, by five or more persons, as a co-operative association, society, company, or exchange, for the purpose of conducting any agricultural dairy, mercantile, merchandise, brokerage, manufacturing, or mechanical business on the co-operative plan; and in addition to the same items in the certificate, "co-operative" must be a part of the name. Code, § 3855, as amended by Acts 1920, p. 568, which see for special provisions.)

Third Class. How charter obtained for railroad.—A corporation of the third class (railroads) is created in similar manner as the first class, by not less than seven persons, and the certificate is called "articles of association", which does not require the certificate of the judge, and they need not be recorded in the clerk's office. The items of the articles are of course somewhat different. (Code, § 3856 and § 3857, as amended by Acts 1920, p. 437.)

For special provisions as to such corporations, see Code, §§ 3858-64, and §§ 3936-4019.

Fourth Class. How charter obtained for public service corporation (other than railroad).—A corporation of this class is created like one of the third class both being public service

corporations), except by not less than five persons, and the items of the articles are somewhat different. (Code, §§ 3865-6.)

For special provisions as to such corporations, see Code, §§ 3867-71, §§ 3882-3903 (generally); §§ 4020-1 (canal companies); §§ 4022-6 (steamships and steamboats); §§ 4027-34 (express companies); §§ 4035-57 (telegraph and telephone companies); §§ 4058-73 (public utility companies—heat, power, light, electric railway, cold storage, viaduct, conduit, bridge, gas, and water companies); §§ 4074-97 (turnpikes).

Fifth Class. How charter obtained for non-stock corporation.—Such a corporation (but not a church or religious denomination) may be created like the first class, by three or more persons, but the items of the certificate are somewhat different, and the judge must add to this certificate, "That the persons signing and acknowledging it are of good moral character and suitable and proper persons to be incorporated for the purposes set forth in the certificate for incorporation." (Code, §§ 3872-4, and Acts 1922, amending §§ 3872-3.)

For special provisions as to such corporations, see Code, § 3875, as amended by Acts 1918, p. 177; §§ 3876-80, and Acts 1922 amending §§ 3876, 3879.

As to amendments or alterations of a charter, the directors pass a resolution for that purpose, and call a meeting (by proper notice) of stockholders to pass on it, and if two-thirds vote for it, it passes. The action is certified and acknowledged; and this certificate, with receipt for any fee due the State (see section 5, sub-division (5), below), is presented to the State Corporation Commission. If granted, the certificate, with this order thereon, is certified to the Secretary of the Commonwealth (and to the proper court if it is such as must be recorded there), and then returned to the commission. (Code, § 3780, as amended by Acts 1920, p. 489; § 3875, as amended by Acts 1918; § 1776 (as to non-stock companies).)

But the charter tax must be paid before the amendment is ordered. (Acts 1918, p. 426, amending § 3835.)

In suits, proof of incorporation is not necessary, except where it is denied by affidavit. (Code, § 6127.)

§ 5. Costs of obtaining a charter.—

(1) *General statement as to costs.*—The State imposes a charter fee, which is paid directly into the State Treasury,

and a certificate, showing such payment, is presented to the State Corporation Commission at the same time the certificate for incorporation or articles of association are laid before it. The charter fees depend upon the character of the business to be transacted by the corporation.

(2) *Fees on charters of domestic transportation and transmission companies.*—"Every domestic corporation authorized by its charter to exercise the powers of a transportation or transmission company, (see sec. 2, above,) or to own, lease, construct, maintain and operate a public service line or road of any kind, upon the granting or extension of its charter, shall pay a fee into the treasury of the State of Virginia to be ascertained and fixed as follows: For a company whose maximum capital stock is:"

<i>Maximum Capital</i>	<i>Fees</i>
\$5,000 or under	\$ 25
Over \$5,000 to \$10,000	50
" 10,000 to 25,000.....	75
" 25,000 to 50,000.....	125
" 50,000 to 100,000.....	200
" 100,000 to 300,000	325
" 300,000 to 500,000.....	450
" 500,000 to 800,000.....	575
" 80,000 to 1,000,000.....	750
" 1,000,000 to 10,000,000.....	1,000
" 10,000,000 to 20,000,000.....	1,250
" 20,000,000 to 30,000,000.....	1,500
" 30,000,000 to 40,000,000.....	1,750
" 40,000,000 to 50,000,000.....	2,000
" 50,000,000 to 60,000,000.....	2,250
" 60,000,000 to 70,000,000.....	2,500
" 70,000,000 to 80,000,000.....	2,750
" 80,000,000 to 90,000,000.....	3,000
" 90,000,000	5,000

"For the purpose of this act the amount to which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock."
(2 Code, p. 3111, § 37.)

The State Corporation Commission will grant relief from excessive or erroneous charter tax or fee (Code, § 3775).

(3) *Fees on charters of other domestic corporations.*—

Every domestic corporation, other than such as are described in the last preceding section, upon the granting or extension of its charter, shall pay a fee into the treasury of the State of Virginia to be ascertained and fixed as follows:

For a company whose maximum authorized capital stock is \$50,000 or less, \$10; for a company whose maximum authorized capital stock is over \$50,000 and less than \$3,000,000 twenty cents for each \$1,000 or fraction thereof; for a company whose maximum authorized capital stock is \$3,000,000 or more, \$600; provided, however, that building fund associations, mutual insurance companies without capital stock, and other mutual companies not organized for strictly benevolent or charitable purposes, shall pay twenty-five dollars only for such certificate or incorporation or charter granted; and provided further, that no fee shall be imposed on corporations organized for religious, benevolent or literary purposes, or to conduct a purely charitable institution or institutions. See note under (2), above. (2 Code, p. 3112, § 38.)

(4) *Entrance fees on foreign corporations.*—Every foreign corporation, when it obtains from the State Corporation Commission a certificate of authority to do business in this State, shall pay an entrance fee into the treasury of Virginia, to be ascertained and fixed as follows:

“For a company whose maximum capital stock is \$50,000 or less, \$30; for a company whose capital stock is over \$50,000, and not to exceed \$1,000,000 sixty cents for each \$1,000 or fraction thereof.” [For over \$1,000,000 the fees are the same as on domestic transportation or transmission companies—see table above.] “Provided, however, that foreign corporations without capital stock shall pay fifty dollars only for such certificate of authority to do business in this State. For the purpose of this act the amount in which the company is authorized by the terms of its charter to increase its capital stock shall be considered its maximum capital stock.” (2 Code, p. 3112, § 38a.)

(5) *Fees on charter when amended or enlarged or capital stock increased.*—A charter heretofore granted or issued under the law of this State, whereby none of the powers of a transportation or transmission company, or other public service corporation, were conferred upon the corporation so

chartered, shall not be amended so as to add to the powers and privileges originally acquired by the corporation any of the powers, rights and privileges of transportation or transmission or of any other public service company.

Upon the amendment of any charter, domestic or foreign, the fee to be charged on the amended charter shall be an amount equal to the difference between the amount already paid on the original charter and the amount required by this act to be paid on the maximum amount provided for in such amendment; and upon the amendment or extension of any charter, domestic or foreign, if no fee was paid to this State on the original charter, the amount to be paid shall be the same as would have to be paid on an original charter.

Upon the amendment or extension of a charter of a transportation or transmission company, or any other public service company, in the event that the charter fee paid on the original charter and any prior amendments shall be less than the amount of charter fee required to be paid on an original charter of that character by the terms of this act, then a charter fee shall be paid on the amended charter equal in amount to the difference between the charter fee already paid on the original charter and any prior amendments thereof, and the amount required by this act to be paid on the maximum amount of authorized capital stock provided for in the charter of said corporation at the time of such amendment. Upon the merger or consolidation of two or more corporations in the manner provided for by the laws of this State, whenever one of the corporations so merging or consolidating is a foreign corporation, then a charter fee shall be paid, as provided for in this act, upon the amount of capital stock proposed to be issued by the new or consolidated corporation taken as the maximum capital stock for the purpose of estimating said charter fee. See note under (2) above. (2 Code, p. 3113, § 39.)

(6) *How fees paid by foreign corporations; no right to conduct business until paid.*—The fees hereinbefore required to be paid by corporations organized under the laws of a jurisdiction beyond this State, and proposing to transact business in this State, shall be paid direct into the treasury of the State, whereupon the State Corporation Commission may issue a certificate authorizing the said corporation to transact such

business and conduct operations of a character to be described in said certificate within this State; but the said corporation shall not have the right to transact business or conduct operations of any character in this State until said fees have been paid, and said certificates been duly issued. Nothing contained in this section or the three preceding sections, shall be construed to impose a fee for a charter, or for authority to transact business in this State, upon any company which has already paid the fee or tax heretofore imposed by law upon its charter, or for authority to transact business in this State; but this provision shall not be construed to exempt any amendment or extension of any such charter or of such authority to transact business in this State from the fees imposed by the sections hereinabove mentioned, or either of them. And the clerk of the State Corporation Commission shall, along with the order of the Commission in the premises, record said certificate, and the certificate of the auditor of public accounts as to the payment of such fees in a proper book to be kept by said clerk for the purpose. (2 Code, p. 3113, § 40.)

(7) *Clerical fees that must be paid on filing certificate of incorporation, etc.*—The State Corporation Commission instructs that applications for charters should be accompanied by *separate certified checks or bank drafts, postal notes or money orders* drawn to the order of the respective departments as follows:

1st. Certificate of Auditor of Public Accounts showing payment into treasury of proper charter fee, as provided for in sections 37 or 38 of tax law. (In lieu of this certificate, a certified check or bank draft, drawn to the order of the Treasurer of Virginia, can be enclosed).

2d. To State Corporation Commission, for tax on its seal and cost of entering, issuing and certifying. \$5.00.

3d. To Secretary of the Commonwealth, for amount of his recording fee, in accordance with the following specifications:

For recording charter, including order of State Corporation Commission, and certifying same, never less than. . . . \$3.00

This is the minimum fee for any charter, or amendment of two pages or less, and for each additional page (exceeding two) of application. 50 cents.

4th. To Clerk of Court for same amount for his record-

ing fee, as is provided for Secretary of Commonwealth, except that articles of association of public service corporations (see section 2, above), are only required to be recorded in the office of the Secretary of the Commonwealth; therefore, no court clerk is entitled to a fee on articles of association. (If in doubt as to the proper court in which to be recorded, make check payable to State Corporation Commission and it will be endorsed to proper party.)

(8) *Annual registration fee.*—"Every domestic corporation, other than a purely charitable institution, and every foreign corporation doing, or authorized to do, business in this State, whose maximum capital stock is fifteen thousand dollars, or under, and every such corporation organized on a mutual basis or without capital stock, shall pay into the treasury of the State on or before the first day of March, in each and every year, an annual registration fee of five dollars; a corporation whose maximum capital stock is over fifteen thousand dollars, and does not exceed fifty thousand dollars, shall pay an annual registration fee of ten dollars; a corporation whose maximum capital stock is over fifty thousand and does not exceed one hundred thousand dollars, shall pay an annual registration fee of fifteen dollars; a corporation whose maximum capital stock is over one hundred thousand dollars, and does not exceed three hundred thousand dollars, shall pay an annual registration fee of twenty dollars; and a corporation whose maximum capital stock exceeds three hundred thousand dollars shall pay an annual registration fee of twenty-five dollars; said annual registration fee shall be irrespective of any specific license tax or other tax or fee imposed by law upon said corporation for the privilege of carrying on its business in this State, or upon its franchise, property or receipts.

"The State Corporation Commission shall ascertain from its record the amount of the authorized maximum capital stock of each of said corporations, as of the first day of January of each year, and shall assess against each such corporation the registration fee herein imposed, and a certified copy of the assessment, when made, shall be forwarded by the clerk of the State Corporation Commission, before the fifteenth day of February, to the auditor of public accounts, and to each such corporation.

"The State Corporation Commission may require every

domestic and foreign corporation, in the month of January, in each year, and within such time as it may prescribe, to make to the commission, on forms prescribed by it, such report of the status, business, and condition of each such corporation as the commission may call for.

"The failure of any corporation for two successive years to pay its annual registration fee, or to make such report, shall, when such failure shall have continued for ninety days after the expiration of such two years, operate, without further proceedings, as a revocation and annulment of the charter of such corporation, if it be a domestic corporation, or if its certificate of authority to do business in this State, if it be a foreign corporation, and the State Corporation Commission shall publish the fact or such revocation or annulment once a week for four consecutive weeks in a daily newspaper published in the city of Richmond, Virginia.

"The failure of any corporation to pay its annual registration fee for any single year shall, when such failure shall have continued for ninety days after the same has been assessed, subject such corporation to a fine of not less than double the amount of such assessment, to be imposed and judgment entered therefor by the Corporation Commission." (2 Code, p. 3114, § 41, as amended by Acts 1922.)

Any such corporation which shall fail to make the report hereinbefore required, within the prescribed time, shall be liable to a fine of not less than twenty-five nor more than one hundred dollars for each offense and each period of thirty days wherein such company may be in such default in making such report shall constitute a distinct and separate offense. The said fine to be imposed and judgment entered therefor by the State Corporation Commission, after thirty days' notice to any such defaulting corporation to appear before the said commission and to show cause, if any, against the imposition of such fine, subject to appeal to the Supreme Court of Appeals of Virginia. (2 Code, p. 3114, § 42.)

(9) *Annual State franchise tax.*—Every corporation, joint stock company or association, organized or formed under, by or pursuant to law in this State, except railway, canal, light, heat and power companies, gas and water companies, insurance, banking and security companies, telephone companies; having an authorized maximum capital stock of five

thousand dollars or less, cemetery, religious and charitable associations, shall, in addition to the charter fee, tax on property, and income or receipts and license tax, and the registration fee prescribed by law, pay into the treasury of the State on or before the first day of March of each and every year, an annual State franchise tax to be assessed by the State Corporation Commission.

"The amount of such franchise tax shall be as follows:

Where the maximum capital stock is \$25,000 and under, \$10; over \$25,000 and not in excess of \$50,000, \$20; over \$50,000, and not in excess of \$100,000, \$40; over \$100,000 and not in excess of \$300,000, \$60; over \$300,000, and not in excess of \$500,000, \$100; over \$500,000, and not in excess of \$1,000,000, \$200; and for all in excess of \$1,000,000 an additional sum of \$10 for each \$100,000 or fraction thereof in excess of \$1,000,000.

"The State Corporation Commission shall ascertain the amount of the authorized maximum capital stock of each such corporation, company or association as of the first day of January in each year, and shall assess against each such corporation, company or association the State franchise tax herein imposed, and a certified copy of such assessment, when made, shall be forwarded by the clerk of the State Corporation Commission before the fifteenth day of February to the auditor of public accounts and to the president or other proper officer of every such corporation, company or association.

"Any such corporation, company or association failing to pay said tax into the State treasury within the time prescribed shall incur a penalty thereon of five per centum and interest at the rate of six per centum per annum on the total amount of tax and penalty from the date when the same was due until paid, which shall be added to the amount of said tax and failure for two successive years to pay said tax, when such failure shall have continued for ninety days after the expiration of such two years, shall operate without further proceedings as a revocation and annulment of the charter of such corporation and the State Corporation Commission shall publish the fact of such revocation and annulment once a week for four consecutive weeks in a daily newspaper published in the city of Richmond, Virginia. (2 Code, p. 3115, § 43, as amended by Acts 1922.)

For annual franchise tax on insurance companies, see

Code, p. 3093, § 23; on railway and canal corporations, see § 28; on express companies, see § 31; on telegraph and telephone companies, see § 36, as amended by Acts 1919, p. 69; building and loan associations are exempt from franchise tax. (§ 4168 of Code).

§ 6. First meeting of subscribers for organization.—

(1) *Items of business.*—After the certificate of incorporation has been lodged with the Secretary of the Commonwealth, and more usually after the certificate of incorporation has been certified to and recorded by the clerk of the proper court, a meeting of the subscribers to the capital stock of the corporation should be held at the principal office of the company in Virginia, and the preliminary formal organization of the company effected.

The common practice is for the subscribers to sign a written waiver of notice fixing the time and place of the meeting.

A certified copy of the certificate of incorporation should be presented, and it is usual to enter it at length in the minutes.

The by-laws should be adopted section by section, and these also should be entered at length in the minutes.

The law provides (Code, § 3850) that the officers and directors mentioned in the certificate of incorporation shall continue in office, for a year, unless sooner removed by the stockholders. Even when it is not desired to make any change in the officers and directors, it is usual to formally elect the directors and make it a matter of record in the minutes.

It is sometimes well to authorize the issue of the maximum amount of the capital stock as set out in the certificate of incorporation. This can be done by a resolution at this time and avoid the necessity of calling another stockholders' meeting, leaving it within the power of the board of directors, at their discretion, to issue the additional stock.

A resolution authorizing the directors to assess the stock in accordance with the terms of the stock subscription should be passed.

In case the company is formed for the purpose of taking over an existing business or purchasing certain property the stockholders should authorize the directors to take over and

purchase the business or property and pay for it in stock of the company, or partly in stock and partly in cash or obligations of the company, as the circumstances of the case may require.

The design of the seal of the company should be adopted and the form of the stock certificate should also be passed upon and approved and entered at length in the minutes.

A direction should be placed upon the record that the secretary forthwith file with the clerk of the proper court the list required by section 3854, of the Code.

There is no necessity for any fixed number of subscribers present in person at this meeting; it is legal, and not unusual, for all, or nearly all, the subscribers to attend by proxy. (Williams' Corp. Laws of Va., p. 217; Dill's Notes, p. 163.)

(2) *Items for the by-laws.*—The Stockholders have power to make by-laws, ordinances and regulations not contrary to law; but the corporation may in the certificate or articles of incorporation or by a resolution of its stockholders, confer this power upon the directors, which the stockholders may alter or repeal, (Code, §§ 3777, 3787.)

The following matters should be provided for in the by-laws:

(1) Provisions for fixing and altering the number of directors, unless these matters are provided for in the certificate or articles of incorporation (Code, § 3777).

(2) Fixing the term of office of the officers and directors, unless provided for in the certificate or articles (§ 3777).

(3) General provisions for the government of all under the authority of the corporation (§ 3777).

(4) General provisions for the management of the estates, and the due and orderly regulation of the affairs of the corporation (§ 3777).

(5) Provision for active and honorary members of non-stock corporations (§ 3879).

(6) Provision for an executive committee (§ 3853).

(7) The time for the annual meeting of stockholders, unless provision therefor has been made in the certificate of incorporation (§ 3786).

(8) Limitations, if any, upon the officers and directors (§ 3789).

(9) Provision as to election of president (§ 3789).

(10) The manner of transferring stock (§§ 3794, 3797)

(11) The manner of calling and conducting meetings, what notice thereof shall be given, and in what manner (§ 3796).

(12) What number of shares shall entitle the stockholder to one, or more votes (§ 3796.) In the absence of any such provision the matter is fixed by law (§ 3799).

No form of by-laws can be given which may be safely followed under all circumstances. The by-laws are a supplement to the certificate of incorporation and should follow and complete the scheme of organization laid therein, especially with reference to the government of the internal affairs of the company. As the former requires the services of skilled counsel, so the latter requires like assistance, and no ready-made form of by-laws would without modification, be valuable for general use. The sections pertaining to the business management of the company are specially susceptible of changes to meet the requirements of each case. (Williams' Corp. Laws of Va., p. 210.) For a suggestive set of by-laws, see No. 13, under section 17, below.

§ 7. First meeting of directors.—The meeting of the directors need not be held in Virginia (Code, § 3784). It may be held at any place fixed upon and agreed to by the directors as evidenced by a waiver signed by them all, fixing the time, place and object of the meeting, unless, of course, the time and place of such meeting has been fixed by the stockholders, which is usually the case.

The minutes of the stockholders' meeting should be read and the recommendations therein, if any, acted upon.

The law provides that the officers and directors mentioned in the certificate of incorporation shall continue in office for a year unless sooner removed by the shareholders; but it is usual for the directors at their first meeting to formally elect the officers and make it a matter of record on the minutes. The board should therefore proceed to the election of officers, except the president in cases where the by-laws do not otherwise provide.

The treasurer should give a bond, the form, the amount and the sureties or surety being passed upon and approved by the board.

If the by-laws provide for an executive committee, the members should be appointed.

The secretary should be given authority to procure the corporate books, etc.

A resolution should be placed upon the records in the form required by the bank with which the company is to deposit, authorizing the treasurer to open a bank account with the bank and designating the manner in which checks and drafts shall be signed, whether by one officer or more. A certified copy of the resolution should be filed with the bank.

If allowed by the by-laws, the directors should pass a resolution with regard to the office of the company outside of the State of Virginia, and, if desired, should authorize meetings of the board to be held at the office out of the State.

If all the officers and directors are non-residents of the county or corporation in which the principal office of the company is located, the proper officer should be directed to file with the clerk of the proper court the power of attorney required by section 3854 of the Code.

Also a direction should be placed upon the record directing the proper officer to file with the State Corporation Commission the report required by section 3820 of the Code.

If the corporation is to do business in any state requiring a certificate or statement to be filed, authority should be given to the proper officers to execute such certificate in conformity with the laws of such state.

A formal resolution is usual directing the officers in accordance with the resolution of the stockholders to call the assessment of stock in accordance with the subscription agreement, and also directing the proper officers of the company to complete the purchase of the property, if any, specified in the minutes of the stockholders' meeting, and to issue stock therefor, bearing in mind, of course, the statement that must first be filed with the State Corporation Commission under section 3780 of the Code. An agreement of sale should also be presented, approved and ordered to be executed in behalf of the company. Care should be taken in the resolution to recite that the directors have passed upon the value of the property and that in their judgment it is of the value placed upon it and for which the stock is to be issued.

If the company is organized for the purpose of taking over an existing business, it is usual to send out a circular informing the customers, and sometimes a notice is published in a

newspaper mentioning the change of the firm into a corporation, with the statement that all the shares are taken up by the copartners, or otherwise, in accordance with the facts.

Any bills which have been paid or are to be paid should be passed and audited.

These are the formal provisions, and any further or other provisions or special matters should be inserted at length. (Williams' Corp. Laws of Va., p. 216; Dill's Notes, p. 164.)

The directors may if authorized by the stockholders or by law, designate two or more of their members as an executive committee (Code, § 3853).

§ 8. General provisions as to corporations.—See chapter 147, sections 3776-3848 of the Code, and Acts 1918, p. 426, amending § 3835, and Acts 1920, pp. 594, 565, amending §§ 3846, 3847, respectively, and Acts 1922, amending §§ 3777, 3780-1, 3786, 3788, 3810, 3820, 3822, giving fully general provisions applying to all corporations. Also see sections 2881-3903 (and Acts 1920, p. 411, amending § 3885 and Acts 1920, p. 20, amending § 3897), for general provisions applying to public service corporations (for what are, see section 2, above).

For the supervision of the State Corporation Commission over corporations, see *State Corporation Commission*.

§ 9. Public service corporations.—For what are, see section 2, above. For how charter obtained, see section 4, classes (3) and (4), above; costs and annual fees and organization meetings, see sections 5 to 7, above; general provisions, see section 8, above.

There are special chapters in the Code as to the following public service corporations:

(1) *Transportation companies generally.*—For what these include see section 2, above. For these companies generally, see Code, §§ 3904-35, and Acts 1920, pp. 234, 20, amending, respectively §§ 3905, 3935; and Acts 1922, amending §§ 3918, 3922-3. For special provisions as the different transportation companies, see §§ 3936-4019 (as to railroads); §§ 4020-1 (as to canal companies); §§ 4022-6 as to steamboats and steamships); §§ 4027-34 (as to express companies). Also see titles *Canals and Canal Companies*, *Express Company* and *Railroads and Railroad Companies*.

(2) *Transportation Companies as Common Carriers.*—For transportation companies as common carriers of goods,

live stock, and passengers, see the subject rather extensively treated under title *Common Carrier*.

(3) *Transmission Companies*.—These include telegraph and telephone companies. See *Telegraph and Telephone Companies*.

(4) *Public Utility Companies*.—These are heat, power, light, electric railway, cold storage, viaduct, conduit, bridge, gas, and water companies, which are specially declared to be public service corporations, and as such, subject to the control of the State Corporation Commission. (Code, §§ 4035, 4040); and they are subject to the same provisions as telegraph and telephone companies, and “public utility” companies are made as to occupation of roads, streets, etc. (Code, §§ 4058, 4061), to include telephone companies (Code, § 4067, as amended by Acts 1922). Special provisions are made for laying a pipe or conduit, getting the consent of boards of supervisors and turn-pike companies contracting for rights of way, etc., with provisions for condemning the land and compensation therefor, in case the owner and the company cannot agree (Code, §§ 4059-63).

Every public utility company must file a schedule of rates and changes, open to public inspection, with the State Corporation Commission (Code, § 4065); and they are required to furnish reasonably adequate services and facilities (§§ 4066, 4068), and to this end tests and equipment may be provided by the State Corporation Commission, to whom the company must report such facts as the commission may ask (§§ 4069-70).

If the commission, upon investigation, finds the rates, tolls, charges, schedules, or joint rates, to be unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of law, it has power to fix, and order substituted therefor such rates, tolls, charges, and schedules as shall be just and reasonable (§ 4071); and the commission may make such change in the regulations, measurements, proceeds, services, and acts as may be just and reasonable (§ 4072). These remedies are in addition to any existing remedies at common law in equity, or by statute (§ 4073). See *Public Utility Companies*.

§ 10. *Foreign corporations*.—No foreign public service corporation is allowed to do business here, except one (as, a railroad, telegraph, telephone, canal, or steamboat company)

whose line or route extends across the State boundary, and those public service corporations already operating in the State when the Constitution was adopted (1902), which must be incorporated here if it would exercise any additional franchise or right; and such corporation is not permitted to do anything not allowed to a domestic corporation, or given any special privileges; but the legislature may, if it sees fit, discriminate against any foreign corporation. (Va. Const., § 163.) And a foreign corporation is not permitted to conduct their business so as to infringe the equal rights of individuals or the general well being of the State. (Va. Const., § 159.)

Their name must not conflict with that of a domestic corporation (Acts 1918, p. 401.)

(1) *Foreign manufacturing and mining corporations.*—Such corporations may operate in this State according to their charters or articles of incorporation, but cannot acquire over 10,000 acres of land in any one county over what they own when the Code takes effect (January 13, 1920). (Code, § 3844.)

(2) *What foreign corporation must do before transacting business here.*—Every corporation doing business in this State must have and keep an office here for the payment of claims of residents, but a foreign corporation which deposits bonds here for the protection of its Virginia patrons, need not maintain such an office; and every foreign corporation, before doing business here, must present to the State Corporation Commission, a power of attorney, executed in duplicate, appointing the Secretary of the Commonwealth its agent, upon whom all lawful process shall be served, and who may enter an appearance in its behalf; two duly authenticated copies of its charter; and the certificate of the Auditor of Public Accounts of the payment of the charter or entrance fee (see section 5, (4), above). Thereupon, the commission issues a certificate of authority or license to do business in this State. If it acts without such certificate, it is subject to a fine of from \$10 to \$1,000. Such corporation may cease to do business here by surrendering the certificate to the Commissioner, or if lost by filing an affidavit of the fact, and paying all taxes, fees, and charges due the State. (Code, §§ 3844, 3847, as amended by Acts 1920, p. 565; § 3848.)

Same provisions are made as to foreign telegraph and telephone companies (§ 4036).

Similar provisions are made as to license for a foreign insurance company; but the Commissioner of Insurance issues the license, and the Secretary of the Commonwealth is appointed its agent by a resolution of its board of directors. (§§ 4176-81; and Acts 1920, p. 22, amending § 4180; §§ 4207-9, 4272). For conditions on which such license may be renewed, see Code, § 4226. Foreign insurance companies are not to do business in Virginia except through resident agents (§§ 4222-5).

A foreign express company is required to appoint the Secretary of the Commonwealth its agent and to deposit bonds (§§ 4027-30).

A foreign railroad company doing business here is required to be chartered in this State (§ 3955).

A foreign bank (not chartered under Federal authority) cannot do business in this State (§ 4130).

For how and when a foreign building and loan association may do business in Virginia see Code, §§ 4158-66.

A foreign corporation made domestic "for all purposes" is not liable to attachment as a foreign corporation; yet may still remove a suit to the Federal Court (Lile's notes, 188; Va. Const., § 163; 32 Grat. 445; 110 Va. 369).

(3) *Entrance fee on foreign corporations.*—See section 5, (4), above.

(4) *Where suits and attachments brought against a foreign corporation.*—An action, suit, or attachment against a foreign corporation is brought in the county or city "wherein its statutory agent resides (Richmond city) or it has estate or debts owing to it;" or "wherein the cause of action, or any part thereof, arose." (Code, §§ 6049-50, 6381.)

In the case of *quo warranto* proceedings, they are brought in the court of the county or city wherein its principal office is, or its president or other chief officer, or one of the defendants, resides; or, in the absence of these, in the circuit court of the city of Richmond. (Code, § 6052.)

An attachment lies against a foreign corporation having estate or debts owing to it in the county or city where it issues, but only where the claim is due, or where some other ground is joined. (Code, §§ 6378-9.)

(5) *On whom and how process or notice served on foreign corporation.*—Every foreign corporation or foreign fraternal benefit society doing business in this State must by power of attorney (resolution of board of directors, in case of insurance companies) appoint the Secretary of the Commonwealth its agent, upon whom (or the person in charge in his absence) shall be served (in duplicate and at least 10 days before judgment) all lawful process or notice, and the secretary may enter appearance for it. He must mail a copy of the process or notice to the company or society, or, where created in a foreign country, to its resident manager (if any) here. He collects from the plaintiff \$2.50 for the first copy and 50 cents for every other, which is taxed as costs in the suit. (Code, §§ 3845-6; Acts 1920, p. 594, amending § 3846; § 4207.) A process or notice must be served on the statutory agent of a foreign corporation; but if none, then on any other agent of the corporation in the county or city in which he resides or in which his place of business is; if no other agent, then on affidavit of those two facts an order of publication may be awarded against it. (Code, § 6064.) And this applies in warrants for small claims and attachments (Code, §§ 6020, 6390, 6415.)

Service on the statutory agent may be as any other process or notice is served. But service on any other person is by delivering to him a copy of the process or notice "in the county or city wherein he resides, or his place of business is, or the principal office of the corporation is located; and the return shall show this, and state on whom and when the service was; otherwise it shall not be valid." "Agent" other than the statutory agent (mentioned in section 6064) includes "a depot or station agent of a railroad company, a telegraph or telephone operator of a telegraph, telephone or railroad company, and a toll gatherer of a canal or turnpike company." (Code, § 6066.)

For order of publication against a foreign corporation or a non-resident person (the proceeding being uniform now), see *Order of Publication*.

§ 11. Where suits and attachments brought against a corporation.—

- (1) *Foreign corporation.*—See section 10, (4), above.
- (2) *Domestic corporations.*—An action, suit, or attach-

ment may be brought against a corporation in the county or city "wherein any of the dependants may reside"; or wherein its principal office is or its president or other chief officer resides; or wherein the course of action, or any part thereof, arose, although none of the dependents reside therein (Code, §§ 6049-50, 6381.)

In *quo warranto* proceedings, jurisdiction is in the court of the county or city, wherein its principal office is, or its president or other chief officer resides, or one of the defendants, resides; or in the absence of these, in the circuit court of the city of Richmond. (§ 6052.)

In the case of a warrant for a small claim before a justice, "if a public service corporation be defendant, the warrant may be issued and tried in the county or corporation in which the cause of action, or any part thereof, arose." (§ 6020.)

§ 12. On whom and how process or notice served on a corporation.—

(1) *Foreign corporation.*—See section 10, (5), above.

(2) *Domestic corporations.*—(a) *On whom.*—Process or notice is served on its "president or other chief officer, or on its vice-president, cashier, treasurer, secretary, general superintendent, general manager, or on any one of its directors, or any agent of such corporation or any person declared by the laws of this State to be such agent, if any such officer or agent be found in the city or county in which the suit, action, or proceeding is commenced, and whether so found or not, it may be sent to the county or city in which is located the principal office of such company and be there served on any officer or agent of such company found at such office. If however, the case be against an insurance, guaranty, trust, indemnity, fidelity, or security company, created by the laws of this State, the process or notice shall be directed to the sheriff or sergeant of the county or city wherein the chief office of such company is located." (Code, § 6063, as amended by Acts 1922). When corporation is operated by a trustee, lessee, or receiver, see section 6065. Where all the officers and directors of a corporation are "non-resident of the city or county in which its principal offices ("officers" in the Code) are located, it must (under penalty), before commencing business, by "power of attorney appoint some practicing attorney at law residing in the city or county where the principal office of

said corporation is located, its attorney or agent upon whom all legal process against the corporation may be served, and who shall be authorized to enter appearance in its behalf." The power of attorney is recorded in the clerk's office where the charter is recorded, and a duplicate filed with the State Corporation Commission. "If there be no such attorney in fact in office residing in such county or city," then service may be had upon the clerk of the court of such county or city wherein is such principal office, having jurisdiction of the suit, action or proceeding. (Code, § 3854.)

(b) *How service made.*—Service on any person, other than the statutory agent, is by delivering to him a copy of the process or notice "in the county or city wherein he resides or his place of business is," or the principal office of the corporation is located; and the return shall show this, and state on whom and when the service was; otherwise it shall not be valid."

The term "agent" (other than the statutory agent mentioned in § 6064) includes a depot agent, a station agent of a railroad company, a telegraph or telephone operator of a telegraph, telephone, or railroad company, and a toll-gatherer of a canal or turn-pike company." (§§ 6066, 6020, 63090, 6415.)

Service on a common carrier not incorporated, is provided for in section 6067 of the Code. As to unincorporated associations or orders, see Code, § 6058; and title *Unincorporated Associations, Orders, &c.*

§ 13. Executions against a corporation.—Such executions as may issue against a natural person may issue against a corporation. (Code, § 6481.)

§ 14. Execution and acknowledgment of writing by a corporation.—Deeds by corporations are signed in the name of the corporation by the president or acting president, or any vice-president, or other person authorized by the directors; and the seal is affixed and attested (or witnessed) by the secretary, acting treasurer, treasurer, or person authorized by the directors; and the person signing the name acknowledges the deed as below. (§ 5208, as amended by Acts 1920, p. 586.)

Where a writing purports to be signed in behalf or by authority of a corporation, his acknowledgment is sufficient, without expressing that it was in behalf or by authority of such corporation; and this is true as to any acknowledgment

by any person in a representative capacity. (Code, § 5207.) For form, see section 5207 of the Code, or *Acknowledgments*.

Notaries and other officers holding stock may take acknowledgment of writing executed by companies, if not otherwise interested. (§ 5209.)

§ 15. Affidavits by corporations.—An affidavit by or for a corporation is made by its president, vice-president, general manager, cashier, treasurer, or a director, without any special authorization therefor, or by any person authorized by a majority of its stock holders or directors; and such person is presumed to be an agent, until the contrary appears. (Code, § 276.) See, also, *Affidavits*.

§ 16. How corporation dissolved.—A corporation may dissolve itself—

(1) Before any capital stock is paid or business is begun by all the corporators voluntarily surrendering their franchise or charter, by filing a certificate thereof in the clerk's office of the State Corporation Commission, verified by the oaths of a majority (Code, § 3809); or

(2) Afterwards by the unanimous consent in writing of all the stockholders (without any meeting or notice thereof); but such corporation must publish a notice once a week for four weeks in a newspaper near its principal office, of the date when it proposes to file such consent, and must also at the same time file a petition verified by the affidavit of the president or a vice-president, alleging its reasons for desiring to dissolve; whereupon the commission either authorizes or refuses the dissolution with the right of appeal by any one who has been made a party (Code, § 3810, as amended by Acts 1918, p. 99); or

(3) By consent of two-thirds of all the stockholders, the directors after a personal or letter notice for 10 days calling a meeting for that purpose, passing a resolution to dissolve; notice whereof is mailed to each stockholder and notice of a stockholders' meeting at its principal office is published in a newspaper near its principal office or (if none) one having general circulation there; such consent to be signified in writing (in person or by proxy), and (together with the names and residences of the directors and officers) certified by the president, secretary, and treasurer, to be filed in the clerk's office of the commission; whereupon the commission dissolves

the corporation (Code, § 3810, as amended by Acts 1918, p. 99); or

(4) A corporation may forfeit its charter for wilful failure to use any of its essential functions for two years, or for wilful and habitual misuse of any essential corporate function, on motion of the Attorney-General in the circuit or corporation court where its principal office is (Code, § 3881); or

(5) For six months failure to certify to the clerk of the court where the charter is filed an annual list of its directors and officers, or, where they are non-resident of the county or city where its principal offices ("officers" in the Code) are located, to appoint an attorney-at-law residing there, upon whom process may be served (Code, § 3854); or

(6) Courts of chancery, at the instance of creditors or stockholders, may settle and wind up the affairs of an insolvent corporation (Code, § 3843).

But no order of dissolution will be made until the charter tax is paid. (Acts 1918, p. 426, amending § 3835.)

§ 17. Various forms as to "Corporations."

No. 1 SIMPLE SUBSCRIPTION LIST
(Williams' Corp. Laws of Va., p. 252)
The _____ Company.

To be incorporated under the laws of Virginia.

Capital Stock \$ _____
Shares \$ _____,

We, the undersigned, hereby severally subscribe for and agree to take at their par value the number of shares, of the capital stock of the _____ Company, incorporated, set opposite our respective signatures, said subscriptions to become due as soon as said company is organized and to be then payable in cash on demand of the treasurer of the company.

_____, Va., _____ May, 192—.

Signatures.	Addresses.	Shares.	Amounts.
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

No. 2. CERTIFICATE OF INCORPORATION
(See Sections 4 and 5, above)

Certificate of Incorporation (or *articles of association*) of ____.

This is to certify that we do hereby associate ourselves to establish

a corporation under and by virtue of the provisions of the Code of Virginia 1919, and Acts amendatory thereof, for the purpose and under the corporate name, hereinafter mentioned, and to that end we do, by this our certificate, set forth as follows:

(a) *Name.*

The name of the corporation is to be——.

(b) *Principal Office.*

Its principal office in this State is to be located at——.

(c) *Purposes.*

The purposes for which it is formed are——.

(d) *Capital Stock.*

The maximum amount of the capital stock of the corporation is to be —— dollars, the minimum amount is to be —— dollars; and the capital stock is to be divided into shares of——dollars each.

(e) *Duration.*

The period for the duration of the corporation is unlimited.

(f) *Officers and Directors.*

The names and residences of the officers and directors who, unless sooner changed by the stockholders, are for the first year to manage the affairs of the corporation are as follows:

<i>Name</i>	<i>Office.</i>	<i>Residence.</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____
<i>Directors.</i>		<i>Residence.</i>
_____		_____
_____		_____
_____		_____

(g) *Real Estate*

The amount of real estate to which the holdings of the corporation at any time are to be limited is—— acres.

Given under our hands and seals, this —— day of ——, 192—.

_____ (SEAL.)

_____ (SEAL.)

_____ (SEAL.)

_____ (SEAL.)

State of Virginia,—— of ——, to-wit:

I, ——, a —— in and for the —— and State aforesaid, do certify that ——, whose names are signed to the foregoing writing, bearing the date on the —— day of ——, 192—, have acknowledged the same before me in my county aforesaid. My commission expires——.

Given under my hand this —— day of ——, 192—.

_____ N. P. (or other proper officer).

Virginia:

In the Circuit (or Corporation) Court of ——:

The foregoing certificate of incorporation of the —— was presented to me, ——, judge of the court of —— in term time (or vacation), and having bene examined by me, I now certify (in case the certificate is under sub-division, (5), section 4, above, the Code of Vir-

ginia 1919, and acts amendatory thereof, say "that the said persons signing the said certificate are of good moral character, and suitable and proper persons to be incorporated for the purposes therein set forth and") that the said certificate of incorporation is, in my opinion, signed and acknowledged in accordance with

Given under my hand, this — day of —, 192—.

_____, Judge.

No. 3. CLAUSES OF DIFFERENT PURPOSES FOR WHICH CORPORATIONS
ARE FORMED UNDER § 3850
(Williams' Corp Laws of Va., pp. 199-208; Dill's Forms, Nos. 6 &c.)

(1) *Banking Companies*

To carry on a banking business and in connection therewith to discount bills, notes, and other evidences of debt, receive and pay out deposits with or without interest, receive on special deposit money or bullion or foreign coin, stocks, bonds, or other securities; to buy and sell foreign and domestic exchange, gold and silver bullion, foreign coins, bonds, stocks, bills of exchange, notes, and other negotiable paper; to lend money on percentage, security or bonds, pledges of bonds, or other negotiable securities; to take and receive security by mortgage or otherwise upon property, real or personal; to invest money for individuals or corporations; to do any business and exercise any powers incident to the business of companies doing a banking business.

(2) *Boots and Shoes*

To carry on the business of manufacturers and dealers in boots, shoes, and footwear of every kind and description. To manufacture, buy, sell, import, export, and generally deal in boots, shoes, rubbers, soles, lasts, and all kinds of leather, rubber, or cloth goods. To manufacture, buy, sell, export, import and generally deal in all kinds of blacking, polishes, varnishes, lasts, button hooks, fasteners, and such other articles or merchandise as are usually manufactured by manufacturers and dealers in a similar line of business.

(3) *Building Contractors*

To make, enter into, perform and carry out contracts for constructing, altering, decorating, maintaining, furnishing, fitting up and improving buildings of every sort and kind; to advance money to and enter into contracts and arrangements of all kinds with builders, property owners and others; to carry on in all their respective branches the business of builders, contractors, decorators, dealers in stone, brick, timber, hardware, and other building materials or requisites; to purchase for investment or resale, and to sell houses, lands, real property of all kinds and any interest therein, and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and any other property whether real or personal.

(4) *Coal*

To buy and sell bituminous and semi-bituminous coal, and to act as the agent of coal companies and sell their coal, and to make contracts with coal companies in reference to handling and selling their

coal on such terms as may be agreed upon, and for the purpose of handling coal, to own or rent storehouses, docks, piers and any real estate necessary to the carrying on of the said business.

(5) *Dry Goods*

To carry on all or any of the businesses of manufacturers, merchants, wholesale and retail, importers, exporters, generally without limitations as to class of products and merchandise, but especially of dry goods of every class and description, including laces, embroideries and white goods, linens, silks, notions, ribbons, handkerchiefs, gloves, curtains, textile fabrics of all kinds, household fittings and all articles and commodities of personal and household use and consumption.

(6) *Electrical Business—General*

To carry on the business of electricians, electrical engineers and dealers in electricity, and electric motive power, lighting, and heating. To manufacture, buy, sell, import, export, and generally deal in electrical machinery of all classes and descriptions; also to produce, accumulate, distribute for hire electricity and electromotive force, and to supply the same for use as power for lighting, heating, and motive purposes; to carry on the business of lighting cities, towns, villages, streets, buildings—public or private—by means of electricity, and to supply light and heating power to carriers of passengers and goods either by land or water. To construct, build, purchase, lease, or otherwise acquire, maintain, equip, operate, and build street railways, street cars, and other passenger or freight vehicles operated by electricity or otherwise. To manufacture, use, purchase, lease or otherwise acquire and maintain telephones, telegraphs, phonographs, and all kinds of electrical devices; to construct, operate and maintain, purchase, lease, or otherwise acquire subways, conduits, electric lighting and heating plants. To lay, construct, and maintain cables, wires, lines, and all necessary appurtenances and appliances.

(7) *Electric Lighting*

To manufacture, generate, store, transmit, and distribute electric current for light, heat and power; to manufacture, buy sell, import, export lease, or otherwise acquire and generally deal in machinery and devices for the manufacture, generation, storage, transmission and distribution of electric current for light, heat, and power purposes; to erect, buy, lease, or otherwise acquire, operate and maintain electric lighting, heating, and power plants; to manufacture, buy sell, lease, or otherwise acquire, import, export, and generally deal in electric apparatus of all kinds; to erect, buy sell, lease, or otherwise acquire, maintain, and operate underground subways, conduits, poles, string wires, above, upon, or under the streets, alleys, and territories of counties, townships, cities, towns, and villages, whether maintained or owned by public or private corporations or individuals.

(8) *Engineering*

To carry on the business of mechanical engineers and dealers in and manufacture of plants, engines and other machinery, tool makers, brass founders, metal workers, boiler makers, millwrights, machinists, iron and steel converters, smiths, builders, metallurgists,

electrical, civil and water supply engineers, and to buy, sell, manufacture, repair, convert, alter, let or hire and deal in machinery, implements, rolling stock and hardware of all kinds; to build, construct and repair railroad, water, gas and electric works, tunnels, bridges, viaducts, canals, hotels, wharves, piers, or any like work of internal improvement, public use or utility.

(9) *Gas*

To manufacture, store, sell, distribute, and supply gas, and to operate a gas plant at———. Also to construct works for holding, receiving and distributing gas. Also to manufacture, buy, sell, export, import, and generally deal in gas meters, pipes, stoves, burners, engines, and other appliances and conveniences necessary for the business of the company.

(10) *Hardware*

To engage in business as jobbers and retailers of hardware of all kinds and descriptions. Also to buy, sell, export, import, and generally deal in railway, steamboat, manufacturers', mill, plumbers', miners', blacksmiths', steam fitters', and gas fitters' supplies. Also to buy, sell, export, import, and generally deal in sheet iron, tools, cutlery, saddlery, and saddlers' goods, round and bar iron, bar and tool steel, guns, and sporting goods of all kinds and descriptions.

(11) *Hotel Company*

To build, erect, construct, lease, or otherwise acquire, manage, occupy, maintain, and operate buildings for hotel purposes, dwelling houses, apartment houses, office buildings, and other structures. To buy, own, operate, lease, and occupy lands, buildings for hotels, apartment houses, dwelling houses, office buildings, and business structures of all kinds for the accommodation of the public and of individuals. To keep, manage, conduct, and operate hotels, apartment houses, dwelling houses, restaurants, lunch and tea rooms, barber shops, billiard-halls, cafes, and bars, for the accommodation of the public and of individuals.

(12) *Investment Company*

To issue shares, stock, debentures, debenture stock, bonds, and other obligations; to invest the money so obtained in, and to hold, sell and deal with stock, shares, bonds, debentures, debenture stock and securities of any government, state, corporation, public or private, or other body or authority; to vary the investment of the company; to mortgage or charge all or any part of the property and rights of the company, including its uncalled capital; to make advances upon, hold in trust, issue on commission, sell or dispose of any of the investments aforesaid, or to act as agent for any of the above or like purposes.

(13) *Land and Development Company*

To acquire by purchase, lease, own, hold, sell, mortgage; or encumber both improved or unimproved real estate wherever situated; to survey, sub-divide, plat, and improve the same for purposes of sale or otherwise; also to construct, erect, and operate houses, buildings, dwellings, light and power plants, machinery, and appliances; to erect,

construct, operate and maintain telegraph and telephone line; to furnish water power and electricity for power and lighting purposes; to construct, operate, maintain roadways, tramways and railways.

(14) *Manufacturing*

To purchase, lease, or otherwise acquire lands and buildings in or elsewhere for the erection and establishment of a manufactory or manufactories and workshops, with suitable plant, engines and machinery, with a view to manufacture, purchase, sell or otherwise deal in ———, either directly or indirectly, through the medium of agents or otherwise; in particular to acquire the business now carried on by ———, with the land and buildings, plant, stock and other properties connected with the business, and also the good will of the said business, and the benefit of all pending contracts, and the stock-in-trade thereof, together with the patents and other rights and privileges relating to said business, vested in or held on behalf of them; to purchase or otherwise acquire patents, patent rights and privileges, improvements or secret processes for or in any way relating to all or any of the objects aforesaid, and to grant licenses for the use of, or to sell or otherwise deal with any patents, patent rights and privileges, improvements or secret processes acquired by the company; to sell, lease or otherwise deal with real and personal property of the company.

(15) *Mining—Limited Powers*

To prospect for, locate, acquire by discovery, lease, license, option, purchase, franchise, grant, gift, devise or otherwise, hold, possess, enjoy, develop, mine, work, operate, and exploit mines, mineral lands and claims, mining rights, metalliferous lands and rights in ——— or elsewhere. Also to carry on the business in all its various branches of mining for gold, silver, tin, lead, iron, and coal.

(16) *Mining—Full Power*

To construct, purchase, or otherwise acquire, maintain, and operate tunnels, sluices, reservoirs, and ditches for mining, irrigation, and transportation purposes. Also to purchase, lease, or otherwise acquire lands, mills, mill sites, tunnel sites, buildings, machinery, power houses, pumping plants, pump machinery, dump rights, ditch rights, flumes, pipes, pipe lines, private railways, private tramways, private roads, easements, franchises, and licenses. Also to purchase, construct, lease or otherwise acquire, operate, and maintain electric lightning and power plants, buildings, machinery, appliances, and equipments appertaining thereto. To purchase, construct, lease or otherwise acquire, operate, and maintain telegraph and telephone lines for the transmission of messages and sound by electricity. To furnish gas, water, electricity, power, heat, and light for mining, milling, agricultural, domestic and other uses and purposes, and to sell, lease, or dispose of the same to such persons or corporations, and for such price or prices and on such terms and conditions as to this corporation may seem proper. To develop, sell, store, contract for, and generally deal in and dispose of to such persons or corporations, and for such price or prices and such terms and conditions as to this

corporation may seem proper, electrical and other power for the generation, distribution, and supply of electricity for mining, heating, and power purposes. To purchase, lease, or otherwise acquire, construct, and maintain plants for the purpose of extracting values from refractory ores. To purchase, treat, refine, extract, reduce, crush, calcine, smelt, concentrate, and manipulate all kinds of ores, minerals, and metalliferous substances with a view to obtaining therefrom gold, silver, tin, lead, copper, iron, and other metals, combination of metals, or other valuable substances, with a view to preparing the same for market. Generally to engage in smelting, reducing, crushing, refining, milling, treating, assaying, and selling minerals and ores of all kinds, classes, and descriptions. To buy, sell, manufacture, and generally deal in machinery, blasting powder, and high explosives of every description, fuse, caps, implements, candles, and convenience suitable for use in connection with mining and metallurgical operations. To purchase, lease or otherwise acquire land for the purpose of erecting thereon office buildings, plants, workshops, dwelling houses, warehouses, stores, hotels, and other buildings in connection with the foregoing purposes.

(17) *Publishers*

To manufacture, publish, buy, sell and deal in all kinds of books, periodicals and stationers' supplies as well as all raw materials, which enter into the composition thereof, and generally to do any and all things incidental to said business.

(18) *Realty*

To purchase, lease, hire or otherwise acquire real and personal property, improved and unimproved, of every kind and description, and to sell, dispose of lease, convey and mortgage said property, or any part thereof. To acquire, hold, lease, manage, operate, develop, control, build, erect, maintain for the purposes of said company, construct, re-construct or purchase, either directly or through ownership of stock in any corporation, any lands, buildings, office, stores, warehouses, mills, shops, factories, plants, gas houses, machinery, rights, easements, permits, privileges, franchise and licenses, and all other things which may at any time be necessary or convenient in the judgment of the Board of Directors for the purpose of the company. To sell, lease, hire, or otherwise dispose of the lands, buildings or other property of the company, or any part thereof.

(19) *Saw Mills*

To purchase, lease, or otherwise acquire timber lands, tracts, and rights. To buy, sell, export, import, boom, saw, and prepare for market, and generally deal in timber and wood of all kinds. Also to manufacture, buy, sell, export, import, and generally deal in all kinds of goods and articles manufactured from wood, and generally to carry on business as saw-mill proprietors, timber and lumber dealers.

(20) *Steamship*

Building, buying, selling, equipping, operating and owning steamships, steamboats, sailing ships, boats and other property to be used in such business, trade, commerce and navigation; purchasing and sell-

ing, owning and holding, mortgaging and leasing all kinds of vessels and boats, their apparel and tackles, wharfs, water rights, piers and lands in Virginia and in the other states of the United States, and in such other places as the business of such steamship company may seem to require, or as may be necessary or convenient for the business of the company.

No. 4. ORDER OF COMMISSION, CERTIFICATE OF SECRETARY OF THE
COMMONWEALTH, &C., IN CASE OF CORPORATIONS GENERALLY
(*Idem.*)

Commonwealth of Virginia; Department of the State Corporation
Commission:

City of Richmond, ——— day of ———, 192—.

The accompanying certificate for incorporation, together with a receipt showing payment of the charter fee required by law having been presented to the State Corporation Commission by ——— and the Hon. ———, judge of the ——— court of ———, having certified that the certificate has been signed and acknowledged by said applicants in accordance with law, the State Corporation Commission, having examined said certificate now declare that the said applicants have complied with the requirements of law, and have entitled themselves to a charter, and it is therefore ordered that the said ——— and their associates and successors be, and they are, hereby made and created a body politic and corporate, under and by the name of ——— upon the terms and conditions, and for the purposes set forth in said certificate, to the same extent as if the same were now herein transcribed in full (pursuant to the provisions of the Code of Virginia 1919, and acts amendatory thereof), and with all the powers and privileges conferred and subject to all the conditions and restrictions imposed by law.

And said certificate, with this order, is hereby certified to the Secretary of the Commonwealth for record. Given under our hands this the ——— day of ———, 192—. ———, Chairman.

———, Clerk.

Commonwealth of Virginia

Office of Secretary of the Commonwealth:

In the City of Richmond, the ——— day of ———, 192—.

The foregoing charter of ——— was this day received and duly recorded in this office and is hereby certified to the clerk of the ——— court of ——— according to law.

———, Secretary of the Commonwealth.

Virginia:

In the Clerk's Office of the ——— Court of ——— the ——— day of ———, 192—.

The foregoing charter and certificate of the Secretary of the Commonwealth thereon was this day received, duly recorded, and certified to the clerk of the State Corporation Commission.

Teste: ———, Clerk.

No. 5. ORDER, &C., IN CASE OF PUBLIC SERVICE CORPORATIONS

Commonwealth of Virginia:

Department of the State Corporation Commission.

City of Richmond, ——— day of ———, 192—.

The accompanying articles of association, together with a receipt showing payment of the charter fee required by law, having been presented to the State Corporation Commission by ———, the State Corporation Commission, having examined said articles, now declares that the said applicants have complied with the requirements of law, and have entitled themselves to a charter, and it is therefore ordered that the said ——— and their associates and successors be, and they are hereby, made and created a body politic and corporate, under and by the name of ——— upon the terms and conditions, and for the purposes set forth in said articles, to the same extent as if the same were now herein transcribed in full (pursuant to the Code of Virginia and Acts amendatory thereof) and with all the powers and privileges conferred and subject to all the conditions and restrictions imposed by law.

And said articles, with this order are hereby certified to the Secretary of the Commonwealth for record. Given under our hands, this ——— day of ———, 192—. ———, Chairman.

———, Clerk.

Commonwealth of Virginia:

Office of Secretary of the Commonwealth.

In the city of Richmond, the ——— day of ———, 192—.

The foregoing charter of ——— was this day received and duly recorded in this office according to law.

———, Sec. of the Commonwealth.

No. 6. ORDER, &C., IN CASE OF NON-STOCK CORPORATIONS
(*Idem.*)

Commonwealth of Virginia:

Department of the State Corporation Commission

City of Richmond, ——— day of ———, 192—.

The accompanying certificate for incorporation, together with a receipt showing payment of the charter fee required by law, having been presented to the State Corporation Commission, by ——— and the Hon. ———, judge of the ——— court of ———, having certified that the said persons signing said certificate are of good moral character and suitable and proper persons to be incorporated for the purposes therein set forth, and that the said certificate has been signed and acknowledged by said applicants in accordance with law, the State Corporation Commission, having examined said certificate, now declares that the said applicants have complied with the requirements of law, and have entitled themselves to a charter, and it is therefore ordered that the said ——— and their associates and successors be, and they are hereby, made and created a body politic and corporate, under and by the name of ——— upon the terms and conditions, and for the purposes set

forth in said certificate, to the same extent as if the same were now herein transcribed in full (pursuant to the Code of Virginia 1919, and Acts amendatory thereof), and with all the powers and privileges conferred and subject to all the conditions and restrictions imposed by law.

And said certificate, with this order, is hereby certified to the Secretary of the Commonwealth for record. Given under our hands, this — day of —, 192—.

—, Clerk.

Commonwealth of Virginia:

Office of Secretary of the Commonwealth.

In the City of Richmond, the — day of —, 192—.

The foregoing charter of — was this day received and duly recorded in this office and is hereby certified to the clerk of the — court of —, according to law.

—, Sec. of the Commonwealth.

Virginia:

In the clerk's office of the — court of —, the day of —, 192—.

The foregoing charter and certificate of the Secretary of the Commonwealth thereon was this day received and duly recorded.

Teste: —, Clerk.

No. 7. MINUTES OF FIRST OR ORGANIZATION MEETING OF SUBSCRIBERS
(Williams' Corp. Laws of Va., p. 217; Dill's Forms, No. 28.)

(1) The initial or organization meeting of the subscribers to the capital stock of the — company was held on the — day of —, 192—, at — a. m. (or p. m.), at the principal office of the company at —, pursuant to a written waiver of notice signed by all the subscribers.

(2) The following subscribers were present or represented:

[Insert names of subscribers and number of shares held by each; and state whether present in person or represented by proxy.]

(3) On motion C. C. was elected chairman and S. S. was appointed secretary of meeting.

(4) The chairman reported that the certificate of incorporation of the company was lodged for recordation in the office of the Secretary of the Commonwealth on the — day of —, 192—. The secretary presented a certified copy of said certificate of incorporation, and the same was ordered spread upon the minutes:

[Insert copy.]

(5) The secretary presented and read the waiver of notice of the meeting, which was ordered spread upon the minutes:

[Insert waiver of notice.]

(6) The secretary presented a form of by-laws for the regulation of the affairs of the company, which were read, article by article, and unanimously adopted, and a copy thereof ordered spread upon the minutes:

[Insert by-laws.]

(7) The proxies above mentioned were presented and ordered filed.

(8) The secretary presented the following transfers of subscription to take effect when accepted by the company:

[Insert transfers.]

(9) Messrs. [names of persons to be elected directors, usually same directors as mentioned in the certificate of incorporation] were nominated for directors of the company, to hold office for the ensuing year. No other nominations having been made, the polls were duly opened, and ballot having been duly had, and all the stockholders having voted, the polls were declared closed and the aforesaid gentlemen were declared elected directors of the company.

(10) Upon motion duly seconded the transfers of subscription presented at the meeting were approved and accepted on behalf of the company.

No. 8. MINUTES OF THE FIRST MEETING OF THE DIRECTORS

(Williams Corp. Laws of Va., p. 220; Dill's Forms No 29.)

(1) The first meeting of the board of directors of the _____ Company was held at the principal office of the company at _____ on the _____ day of _____, 192—, at _____ a. m. (or p. m.)

(2) Present Messrs. [Insert names of directors present]. constituting a majority of the board.

(3) Mr. _____ was chosen temporary chairman, and Mr. _____ was appointed temporary secretary of the meeting.

(4) The secretary presented and read a waiver of notice of the meeting, signed by all the directors, and the same was ordered to be spread upon the minutes:

[Insert waiver of notice.]

(5) The minutes of the first meeting of the subscribers were read.

(6) The following gentlemen, naming them, [usually the same as mentioned in the certificate of incorporation] were unanimously elected officers of the company to serve for one year and until their successors are elected and qualify:

President: _____

Vice President: _____

Secretary: _____

Treasurer: _____

(7) The president thereupon took the chair.

(8) It was ordered that the secretary enter upon the discharge of his duties, which he accordingly did.

(9) It was ordered that the treasurer give bond in the sum of _____ dollars, in the form presented at this meeting, which was approved by the board, and submit said bond to the board for approval as to the sufficiency of the surety. The treasurer thereupon presented

his bond signed by himself as principal and by _____ as surety, and the same was approved and ordered to be filed.

(10) The secretary presented the resignation of _____ as directors of the company, and, on motion duly made and seconded, the same was accepted and ordered filed _____ was thereupon duly elected a director of the company to fill the vacancy caused by the resignation of _____.

(14) Upon motion made and seconded, and by the affirmative vote of all present, the following was adopted:

ORDERED, that the principal and registered office of the company in Virginia be established and maintained at [set out the situation distinctly; if in a city, give street and number].

That a transfer book, in which transfers of stock may be registered, and a stock book, containing the names and addresses of stockholders and the number of shares held by each, be kept at the said office, open to the inspection of any stockholders during business hours.

(12) The board of directors were authorized to assess the stock subscribed by the stockholders in accordance with the subscription agreement.

(13) Upon motion, duly made and seconded, and by the affirmative vote of all present, it was

RESOLVED, that the board of directors be and they are hereby authorized to issue shares of the capital stock of the company to the full amount authorized by the certificate of incorporation, in such amounts from time to time as shall be determined by the board, and as may be permitted in accordance with law, and, in the manner permitted by law, in their discretion to accept in full or part payment of any share or shares such property as the board may determine shall be necessary for the business of the company.

(14) Upon motion, duly made and seconded, and by the affirmative vote of all present, the following preambles and resolution were adopted:

WHEREAS, _____ has offered to sell to this company property as follows: [Here insert description]. in consideration of the issue of stock of this company to the amount of _____ dollars (\$_____), par value, and

WHEREAS, it appears to the stockholders that such property is necessary for the business of this company, and that the same is of the value of _____ dollars;

RESOLVED, that the board of directors of this company be and they are hereby authorized, in their discretion, to purchase the property above mentioned for the said price and to issue said stock in payment therefor.

On motion the meeting adjourned.

_____,
Secretary of the meeting.

- (11) Upon motion, duly made and seconded, it was

*Impress
corporate
seal here.*

RESOLVED, that the seal presented at this meeting, an impression of which is directed to be made in the margin of the minute book, be and the same is hereby adopted as the seal of the corporation.

RESOLVED, that the president and treasurer be and they are hereby authorized to issue certificates of stock in the form submitted to this meeting.

RESOLVED, that the stock book and transfer book presented at this meeting be and the same are hereby adopted as the stock book and transfer book, and the secretary is hereby directed to send the same to and keep the same in the principal office of the company.

- (12) Upon motion, duly made and seconded, it was

RESOLVED, that the treasurer be, and he is hereby authorized to open a bank account with the _____ Bank of _____; and be it further

RESOLVED, that until otherwise ordered this bank be, and is hereby authorized to make payments from the funds of this company on deposit with it, upon and according to the check of this company signed by its treasurer and countersigned by its president.

- (13) Upon motion, duly made and seconded, it was

RESOLVED, that an office of the company be established and maintained at _____, in the city of _____, State of _____, and that meetings of the board of directors from time to time may be held either at the office in Virginia, or at such office in the city of _____ or elsewhere as the board of directors shall from time to time order.

- (14) Upon motion, duly made and seconded, it was

RESOLVED, that this company accept the offer of _____ to sell to this company the property described in the draft agreement presented at this meeting, and the board of directors do hereby adjudge and declare that the said property is of the fair value of \$_____, and that the same is necessary for the business of this company; and it is further

RESOLVED, that the president and treasurer be, and they are hereby authorized and directed to issue certificate of the full paid capital stock of this company to the aggregate amount of \$_____, as provided in said agreement.

[Here should follow an assessment upon the shares of stock in accordance with subscription agreement and a resolution carrying into effect the purchase of the property by the issuance of stock in accordance with previous agreement entered into between the incorporators or trustees of the corporation and the vendor of the property.]

- (15) Upon motion, duly made and seconded, it was

RESOLVED, that the proper officers of this company be, and they are hereby authorized and directed in behalf of the company, and under its corporate seal, or otherwise, to make and file the certificate or statement required by law to be filed in any state in which the officers of

the company shall find it necessary to file the same to authorize the company to transact business in such state.

(16) The secretary was ordered to prepare, have executed by the proper officers, and cause to be filed in the office of the State Corporation Commission the report required by section 3820 of the Code of Virginia 1919 and Acts amended thereof.

Upon motion the meeting adjourned.

No. 9. WAIVER OF NOTICE OF FIRST MEETING OF SUBSCRIBERS

(Williams' Corp. Laws of Va., p. 222; Dill's Forms No. 30.)

We, the undersigned, subscribers to the capital stock of the _____ Company, incorporated, a corporation organized under the laws of the State of Virginia, hereby waive notice of the time, place and purpose of the first meeting of the corporation, and fix the _____ day of _____, 192— at _____ a. m. (or _____ p. m.) as the time, and the principal office of the company, at _____, Virginia, as the place of said meeting.

And we hereby waive all the requirements of the statutes of Virginia as to notice of said meeting and consent to the transaction of such business as may come before said meeting.

Dated this _____ day of _____, 192—.

No. 10 PROXY FOR FIRST MEETING OF SUBSCRIBERS

(Williams' Corp. Laws of Va., p. 222; Dill's Forms No. 31.)

The undersigned, subscriber to _____ shares of stock of the _____ Company, incorporated, hereby appoints _____ as proxy, with full power of substitution and revocation, to vote for and on behalf of the undersigned at the first meeting of the corporation to be held _____ day of _____, 192—, and at any adjournment thereof.

Witness my hand and seal this _____ day of _____, 192—.

_____, [SEAL]

No. 11. TRANSFER OF SUBSCRIPTION

(Williams' Corp. Laws of Va., 223; Dill's Forms, No. 32.)

The undersigned, for good and valuable consideration received, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto _____

the right, title and interest of the undersigned as a subscriber to the capital stock of the _____ Company, incorporated, to the extent of _____ shares of the capital stock thereof, and hereby requests and directs the said company to issue the certificates for said shares to the aforesaid transferee or his nominee or assigns.

This transfer to take effect upon the acceptance thereof by the company, the undersigned meanwhile retaining the right to vote upon said shares.

Dated this _____ day of _____, 192—.

Witness:

_____, [SEAL]

No. 12. WAIVER OF NOTICE OF FIRST MEETING OF BOARD OF DIRECTORS
(Williams' Corp. Laws, of Va., p. 224; Dill's Forms, No. 35.)

We, the undersigned, directors of the _____ Company, incorporated, a corporation under the laws of Virginia, hereby waive notice of the time and place of the first meeting of the board of directors, and of the business to be transacted at said meeting.

We designate the _____ day of _____, 192—, at _____ a. m. (or _____ p. m.) as the time, and _____ as the place of said meeting; the purpose of said meeting being the election of officers, the authorization of the issue of the stock of the company, the authorization of the purchase of property necessary for the business of the company, and the transaction of such other business as the board may deem proper.

Dated this _____ day of _____, 192—.

No. 13. BY-LAWS OF A BUSINESS CORPORATION

ARTICLE I—STOCK

1. *Certificates of Stock* shall be issued in numerical order from the stock certificate book; they shall be signed by the president and by the treasurer, and the company's seal shall be affixed thereto and attached by the secretary. A record of each certificate shall be kept on the stub thereof.

2. *Transfers of Stock* shall be made only upon the books of the company, and before a new certificate is issued the old certificate must be surrendered for cancellation, and marked canceled, with the date of cancellation, by the secretary. The stock-books of the company shall be closed for transfers thirty days before general elections and ten days before dividend days.

ARTICLE II—STOCKHOLDERS

1. *The Annual Meeting* of the stockholders of this company shall be held in the principal office of the company in _____, at _____ o'clock on the second day _____ in _____ of each year, if not a legal holiday, but if a legal holiday, then on the day following.

2. *Special Meeting* of the stockholders may be held at the principal office of the company at any time, upon the call of the board of directors, or of stockholders holding together at least one-tenth of the capital stock.

3. *Notice of Meetings*, written or printed, for every regular or special meeting of the stockholders, shall be prepared and mailed to the last-known post-office address of each stockholder not less than ten days before any such meeting, and if for a special meeting, such notice shall state the object or objects thereof.

4. *A Quorum* at any meeting of the stockholders shall consist of a majority of the voting stock of the company, represented in person or by proxy. A majority of such quorum shall decide any question that may come before the meeting.

5. *The Order of Business* at the annual meeting, and as far as possible, at all other meetings of the stockholders, shall be:

- (1) Calling of roll.
- (2) Proof of due notice of meeting.
- (3) Reading and disposal of any unapproved minutes.
- (4) Annual reports of officers and committees.
- (5) Election of directors.
- (6) Unfinished business.
- (7) New business.
- (8) Adjournment.

ARTICLE III—DIRECTORS

1. *There Shall be a Board of* ——— *Directors*, who shall be stockholders for the term of one year, and shall serve until the election of their duly qualified successors.

2. The regular meetings of the boards of directors shall be held in the principal office of the company in ———, at ——— a. m. (or p. m.). on the third ——— of each month, if not a legal holiday, but if a legal holiday then on the day following.

3. Special meetings of the board of directors to be held in the principal office of the company in ——— may be called at any time by the president.

4. The directors may hold their meetings and have an office and keep the books of the company (except the stock and transfer books), outside of the State of Virginia, in the city ———, or such other place or places as they may from time to time determine.

5. Notices of both regular and special meetings shall be mailed by the secretary to each member of the board not less than five days before any such meeting, and notices of special meetings shall state the purposes thereof.

6. A quorum at any meeting shall consist of a majority of the entire membership of the board. A majority of such quorum shall decide any question that may come before the meeting.

7. All officers of the company shall be elected by ballot by the board of directors at their first meeting after the election of directors each year. If any office becomes vacant during the year, otherwise than by removal, the board of directors shall fill the same for the unexpired term. The board of directors shall fix the compensation of the officers and agents of the company.

8. The order of business at any regular or special meeting of the board of directors shall be:

1. Reading and disposal of any unapproved minutes.
2. Reports of officers and committees.
3. Unfinished business.
4. New business.
5. Adjournment.

9. There shall be an executive committee of ——— directors appointed by the board, who shall meet when they see fit. They shall have authority to exercise all powers of the board at any time when the board is not in session.

The executive committee may act by the written consent of a quorum thereof, although not formally convened.

ARTICLE IV—OFFICERS

1. *The officers* of the company shall be a president, a vice-president, a secretary, and a treasurer, who shall be elected for one year and shall hold office until their successors are elected and qualify. The positions of secretary and treasurer may be united in one person.

2. *The president* shall preside at all meetings, shall have general supervision of the affairs of the company, shall sign all certificates of stock and sign or countersign all contracts and other instruments of the company; shall make reports to the directors and stockholders, and perform all such other duties as are incident to his office or are properly required of him by the board of directors. In the absence or disability of the president, the vice-president shall exercise all his functions.

3. *The secretary* shall issue notices for all meetings, shall keep minutes, shall have charge of the seal and the corporate books, shall sign with the president such instruments as require such signature, and shall make such reports and perform such other duties as are incident to his office, or are properly required of him by the board of directors.

4. *The treasurer* shall have the custody of all the funds and securities of the company, and deposit the same in the name of the company in such bank or banks as the directors may elect; he shall sign all checks, drafts, notes, and orders for the payment of money (which shall be countersigned by the president) and he shall pay out and dispose of the same under the direction of the president. He shall at all reasonable times exhibit his books and accounts to any director or stockholder of the company upon application at the office of the company during business hours. He shall sign all certificates of stock signed by the president.

ARTICLE V—DIVIDENDS

Dividends shall be declared only from the net profits at such times as the board of directors shall deem it prudent to direct, and no dividend shall be declared out of or that will diminish the capital of the company.

ARTICLE VI—SEAL

The corporate seal of the company shall consist of two concentric circles, between which is the name of the company, and in the center shall be inscribed the words "Corporate Seal."

ARTICLE VII—AMENDMENTS

These by-laws may be amended, repealed, or altered, in whole or in part, by a majority vote of the entire outstanding stock of the company, at any regular meeting of the stockholders, or at any special meeting where such action has been announced in the call and notice given of such meeting.

No. 14. STATEMENT REQUIRED BY CONSTITUTION TO BE FILED WITH CORPORATION COMMISSION BEFORE ISSUE OF STOCK.

(Approved by State Corporation Commission.)

Made by the _____ Company, incorporated, to the State Corporation Commission, pursuant to Section 167 of the Constitution of Virginia, and section 3788 of the Code of Virginia 1919, setting forth the basis or financial plan of stock to be issued by it.

When and how Company was incorporated _____

Location of principal office at _____

<i>Capital stock authorized.</i>		<i>Stock previously issued</i>	
Kind	Maximum Amount of Stock Authorized by Charter and Amendments.	Par Value of Each Share	Amount Stock Issued Previous to Issue for which Application is now made.
Common	\$ _____	\$ _____	\$ _____
Preferred	\$ _____	\$ _____	\$ _____
Total	\$ _____	\$ _____	\$ _____

Stock the Company proposes to issue

Kind	Number of Shares	In one issue or from time to time.	To be paid in money or otherwise.
Common	_____	_____	_____
Preferred	_____	_____	_____
Total	_____	_____	_____

If money is to be received in payment for stock, state fully how many shares are to be sold for money and whether less than par is to be taken, and, if so, lowest amount in dollars and cents per share for which stock is to be issued.

If service or property is to be accepted in payment for whole or part of issue, specify and describe the service or property accurately, and state at what valuation each is to be received; the number of shares to be given for property, and the number for services.

Has the Board of Directors declared the valuation at which the above described property or service is to be received, to be a fair valuation?

STATE OF VIRGINIA, _____ of _____:

I, undersigned _____ President (or Secretary) of _____ having been duly sworn, do make oath that the matters and things in the foregoing statement set forth are true to the best of my knowledge, information and belief.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Notary Public.

No. 15. CERTIFICATE OF COMMON STOCK
(Williams' Corp. Laws of Va., p. 243.)

No. _____ Shares \$ _____ each. _____ Shares
Incorporated under the Laws of
The State of Virginia.
_____ Company, Incorporated
Capital Stock \$ _____.

THIS IS TO CERTIFY, that _____ is the owner of _____ shares of the capital stock of the _____ Company, incorporated, fully paid and non-assessable, transferable only on the books of the company by the said owner thereof in person or by duly authorized attorney, upon surrender of this certificate properly endorsed.

In Witness Whereof, the _____ Company, incorporated, has caused its corporate seal to be hereto affixed and attested by its secretary, and this certificate to be signed in its name and behalf by its president and its treasurer at _____, this _____ day of _____, 192—.

Attest: _____ Company, Incorporated.

By _____

_____, President.

_____, Treasurer.

_____, Secretary.

NO. 16. CERTIFICATE OF PREFERRED STOCK

(Williams' Corp. Laws of Va., p. 244.)

No. _____ Shares \$ _____ each. _____ Shares.

Incorporated under the Laws of

The State of

_____ Company, Incorporated.

Preferred Stock \$ _____.

Capital Stock \$ _____.

Common Stock \$ _____.

THIS IS TO CERTIFY, that _____ is the owner of _____ shares of the preferred stock of the _____ Company, incorporated, fully paid and non-assessable, transferable only on the books of the company by the said owner in person or by duly authorized attorney, upon surrender of this certificate properly endorsed.

The preferred stock represented by this certificate is entitled to an annual dividend of _____ per centum payable out of the net profits of the company before any dividend is paid upon the common stock. Should the net profits in any year be insufficient to pay said preferred dividend, either in whole or in part, any unpaid portion thereof shall become a charge against the net profits of the company and shall be paid in full out of the said net profits before any dividends are paid upon the common stock.

Said preferred stock is subject to redemption at the option of the company at any time after _____ years from the _____ of _____, 192—, upon payment of _____ dollars per share [not less than par] and any accumulated dividends, and, unless sooner retired, shall be redeemed by the company at its par value, with payment of any accumulated dividends, on _____ day of _____, 192—.

Said preferred stock is not entitled to vote at stockholders' meetings of the company, nor to participate in profits beyond its fixed preferential, cumulative, annual dividend of _____ per centum.

In Witness Whereof, the _____ Company, incorporated, has

caused its corporate seal to be hereto affixed and attested by its secretary, and this certificate to be signed in its name and behalf by its president and its treasurer at _____, this _____ day of _____, 192—.

(Affix Corporate Seal.)

_____ Company, Incorporated.

By

_____, President.

_____, Treasurer.

**No. 17. CERTIFICATE OF AMENDMENT OF CHARTER AFTER ORGANIZATION
CHANGING THE NAME, NATURE OF THE BUSINESS, ETC.**

(Williams' Corp. Laws of Va., p. 240.)

(This form may be used for changing the nature of the business, changing the name, decreasing the capital stock, changing the par value of the shares of stock, changing the location of the principal office, extending the corporate existence, creating one or more classes of preferred stock, and making "such other amendments, changes or alterations as may be desired," except for increasing capital stock, as to which see No. 18, below.)

When the capital stock is decreased, the certificate of amendment must be published (Code, § 3781).

*Certificate for Amendment to the Charter of the _____ Company.
Incorporated.*

The _____ Company, a corporation duly created under the provisions of the Code of Virginia 1919, and Acts amendatory thereof, the certificate of incorporation of which was lodged for recordation in the office of the Secretary of the Commonwealth on the _____ day of _____, 192—, [or, if otherwise created, so state the manner and time], desiring to have its charter amended in the respect hereinafter set out, executes this certificate as required by law through its president and under its corporate seal, attested by its secretary, and sets out:

FIRST

That there was held on the _____ day of _____, 192—, in the county (*city or town*) of _____, Virginia, after due notice to all of the directors, a meeting of the board of directors of the said company, at which meeting the said board of directors unanimously passed a resolution declaring that it was advisable to amend the charter of the company so that [here state the particulars,] "its principal office should be in the county (*city or town*) of _____ Virginia;" and to effect these purposes, that the second section of the charter should be amended so as to read as follows:

"Second. The name of the county (*city or town*) wherein the principal office in this State is to be located is [Here insert the proposed place]."

And the said board of directors thereupon ordered a meeting of the stockholders to be called for the _____ day of _____, 192—, ac-

ording to law, and to take action upon the foregoing proposed amendment to the charter of the corporation.

SECOND

That thereafter, on the _____ day of _____, 192—, pursuant to such call of the board of directors, and upon notice given to each stockholder in person (or by publication, or by mail, or otherwise according to law, as the case may be) such notice stating the time, place and object of said meeting, a special meeting of the stockholders of the said corporation was held in the principal office of the company in the county (city or town) of _____, Virginia, at which meeting more than two-thirds in interest of each class of the stockholders having voting power were present in person or represented by proxy.

THIRD

That the foregoing resolution adopted by the board of directors, proposing to amend section 2 of the charter of this company, in the manner hereinbefore set out, was in terms laid before the said stockholders and adopted by unanimous vote in favor thereof, said vote being more than two-thirds in interest of the entire stock of the corporation,

IN WITNESS WHEREOF, the said _____ Company, incorporated, has caused this certificate to be signed by its President (or *Vice-President*) and its corporate seal to be hereto affixed, attested by its Secretary, this _____ day of _____, 192—.

(Affix Corporate Seal.)

_____, President.

ATTEST:

_____, Secretary.

For acknowledgment, see Nos. 25 and 26, below.

No. 18. AMENDMENT TO CHARTER FOR INCREASE OF CAPITAL

(Va. Code 1919, § 3780, as amended by Acts 1920, p. 489; Pollard's Code Biennial 1920, p. 163.)

Certificate for amendment to the charter of the _____ Company. The _____ Company, a corporation duly created by an order of the _____ court of the _____ of _____ entered on the _____ day of _____, 192—, desiring to have its charter amended in the respects hereinafter set out, executes this certificate as required by law through its president and under its corporate seal, attested by its Secretary, and sets out:

(1) That on the _____ day of _____, 192—, there was held in the _____ of _____, Virginia, after due notice to all of the directors, a meeting of the Board of Directors of the said company at which meeting the Board of Directors passed a resolution declaring "that the present capital stock of the corporation is found insufficient for its purposes and that it was deemed requisite" to amend the charter of this company so that its authorized maximum capital stock should be increased from \$25,000 to \$50,000, and \$25,000 thereof should be preferred stock; and to effect these purposes that the third section of the charter should be amended so as to read as follows:

"The capital stock of said company shall not be less than \$10,000 nor more than \$50,000 to be divided into shares of the par value of \$1,000, subscriptions to said stock to be paid in money, land, leases, labor or services or in any other property, real, personal or mixed. Of the said \$50,000, \$25,000 may be common stock and \$25,000 may be preferred stock. The preferred stock to be issued as to bear in dividends at the rate of eight per cent., guaranteed to be paid before any dividends shall be paid on the common stock, and the said preferred stock or any portion of it outstanding to be redeemable at not less than par by the corporation after six months' notice to the holders of any such stock."

And the said board of directors thereupon ordered a meeting of the stockholders to be called for the _____ day of _____, 192—, according to law and to take action upon the foregoing proposed amendments to the charter of the corporation.

(2) That on the _____ day of _____, 192—, there was held at the office of the said corporation in the _____ of _____ a meeting of its stockholders after ten days' notice to all the stockholders, either served in person or by mailing the same as required by law, such notice stating the time and place and general object of the meeting, and the amount to which it was proposed to increase the capital stock. That at the said meeting there was represented in person and by proxy over two-thirds in amount of the stockholders of the said corporation having voting powers. That the foregoing resolution adopted by the board of directors proposing to amend Section 3 of the charter of this company in the manner hereinbefore set out, was in terms laid before the said stockholder's meeting and adopted by a unanimous vote in favor thereof, said vote being more than two-thirds in amount of the entire stock of the corporation.

(3) That the proceedings of said meeting were duly entered on the minutes of the proceedings of the stockholders.

Therefore this certificate is now signed by _____, president of the _____ Company, aforesaid, with its corporate seal thereto affixed, attested by _____, its secretary, at its _____ of _____, Virginia, this _____ day of _____, 192—.

_____, Secretary. _____, President.

(Affix Corporate Seal here.)

This should be acknowledged. See form Nos. 25 and 26, below.

No. 19. FORM OF POWER OF ATTORNEY FOR APPOINTMENT OF AGENT BY A DOMESTIC CORPORATION, DOING BUSINESS IN VIRGINIA, ALL OF THE OFFICERS AND DIRECTORS BEING NON-RESIDENTS OF THE COUNTY OR CITY.

(Va. Code 1919, § 3854; Pollard's Code Biennial 1920, p. 174.)

Know all Men by these Presents:

That _____, a corporation organized and existing under the laws of the State of Virginia, having its principal office in the State of Virginia, at _____, all of the officers and directors of said corporation being non-residents of _____, hereby constitutes and appoints, with his consent and acceptance first obtained, _____, a

practicing attorney-at-law, residing in said _____, to be the true and lawful agent and attorney of said corporation pursuant to the provisions of section 3854 of the Code of Virginia 1919 against said company may be served, and who is hereby authorized to enter an appearance in its behalf in any actions and proceedings; and the said corporation hereby stipulates and agrees that any lawful process against the said corporation which is duly served on said agent and attorney shall be of the same legal force and validity as if served on said corporation.

In Witness Whereof, the said _____, has executed this power of attorney by causing its name to be hereunto affixed by _____ its President, with its corporate seal attested by _____, its Secretary.

All done this _____ day of _____, 192—.

[Affix Corporate Seal here.]

By _____

President.

Attest: _____

Secretary.

State of _____

City (or County) of _____

I, _____, a Notary Public in and for the State and city (or county) aforesaid, do hereby certify that _____ and _____, whose names, respectively, as President and Secretary of _____, are signed to the foregoing power of attorney, have acknowledged the same before me in my city (or county) aforesaid.

My commission expires the _____ day of _____, 192—.

Given under my hand and official seal this _____ day of _____ 192—.

[Affix Official Seal here.]

Notary Public.

The above form is to be recorded in the clerk's office of the court, etc., as provided in this section.

NO. 20. MINUTES OF ANNUAL MEETING OF STOCKHOLDERS

(Williams' Corp. Laws of Va., p. 228; Dill's Forms, No. 43.)

The annual meeting of stockholders was held at the principal office of the company, No. _____ Street, _____ Virginia, on the _____ day of _____, 192—, at a. m. (or p. m.)

The meeting was called to order by Mr. _____, who upon motion, was unanimously chosen chairman, and Mr. _____ was appointed secretary and clerk of the meeting.

The secretary then read the roll of the stockholders entitled to vote at this meeting, with the following result:

The following stockholders were present in person: [giving names and number of shares.]

The following stockholders were represented by proxy: [giving

names of stockholders and proxy, and number of shares], being a majority in interest of all the stockholders of the company.

The proxies presented were ordered to be filed with the secretary of the meeting.

The secretary presented and read a copy of the notice of the meeting, together with proof of the due mailing thereof, to each stockholder of the company, at least ——— days before the meeting, as required by the by-laws.

The transfer book and the stock book of the company, together with a full, true and complete list in alphabetical order of all the stockholders entitled to vote at the ensuing election, with the residence of each and the number of shares held by each, were produced, and remained during the election open to inspection.

Upon motion, duly made and seconded, the reading of the minutes of the last preceding meeting was dispensed with.

Upon motion, duly seconded, the meeting proceeded to the election of ——— directors, by ballot, in accordance with the by-laws, and the polls were opened at — a. m. (or p. m.), and the stockholders prepared and cast their ballots showing that the following gentlemen (stockholders) had received the greatest number of votes, and the chairman declared them duly elected directors of the company, to hold office until the next annual election and until their successors are elected and qualify.

The annual statement of the directors was presented and read and ordered to be received and filed with the secretary.

The report of the ——— for the past year ——— presented and read and ordered to be received and filed with the secretary.

(Here insert record of any other business transacted.)

The secretary was directed to insert in the minute book, for the purpose of reference, a copy of each of the following papers:

- (1) Notice of the meeting and proof of service thereof.
- (2) List of stockholders produced at the meeting.
- (3) Form of proxy.
- (4) Report of ———

No further business coming before the meeting, upon motion, duly seconded, the same adjourned.

—————, Secretary of the meeting.

No. 21. NOTICE OF ANNUAL MEETING OF STOCKHOLDERS
(Williams' Corp. Laws of Va., p. 229; Dill's Forms, No. 44.)

The annual meeting of the stockholders of the ——— Company, incorporated, will be held on the ——— day of ———, 192—, at — a. m. (or p. m.), at the principal office of the company, ——— Street, ———, for the purpose of electing a board of directors and receiving and acting upon the reports of the officers [insert any special business to be transacted], and for the transaction of such other business as may properly come before the meeting.

In accordance with a resolution of the board of directors heretofore adopted, no stock can be voted on which has been transferred on the

books of the company within _____ days next preceding this election.
 Dated, _____, 192—.

 Secretary.

No. 22. PROXY—STOCKHOLDERS' MEETING

(Williams' Corp. Laws of Va., p. 229; Dill's Forms, No. 45.)

Know All Men by These Presents:

That I, the undersigned, being the owner of _____, shares of the capital stock of the _____ Company, incorporated, do hereby constitute and appoint _____ my true and lawful attorney, in my name, place and stead, to vote upon the stock owned by me or standing in my name, as my proxy, at the annual (or *special*) meeting of the stockholders of the said company, to be held at the company's principal office, _____ Street, _____, on the _____ day of _____, 192—, and on such other day as the meeting may be thereafter held by adjournment or otherwise, according to the number of votes I am now or may then be entitled to cast, hereby granting the said attorney full power and authority to act for me and in my name at the said meeting or meetings, in voting for directors of the said company or otherwise, and in the transaction of such other business as may properly come before the meeting, as fully as I could do if personally present with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or substitute may do in my place, name and stead.

In Witness Whereof, I have hereunto set my hand and seal, this _____ day of _____, 192—.

Witness:

_____, [SEAL]

No. 23. ANNUAL REPORT TO STATE CORPORATION COMMISSION (Approved by State Corporation Commission)

FIRST

The name of the corporation is _____

SECOND

The location of the principal office is [give county or city, or street and number, if any].

THIRD

The name and post-office address of the agent upon whom process against the corporation may be served are [to be given only when all the officers and directors are non-residents of the county or city in which the principal office is located, or in case of foreign corporation.]

FOURTH

The character of the business is _____ and as otherwise specified in the certificate of incorporation.

FIFTH

The maximum amount of capital stock authorized is \$_____.
 The amount actually issued and outstanding is \$_____.

CORPORATIONS

SIXTH

The last annual meeting of stockholders was held on the _____ day of _____, 192—.

SEVENTH

The last election of directors was held on the _____ day of _____, 192—.

EIGHTH

The names and addresses of the officers and directors and the time when the office of each expires are as follows:

Names of Directors:	P. O. Address.	Expiration of Term.
_____	_____	_____
_____	_____	_____
_____	_____	_____

Officers:		
President:	_____	_____
Vice-President:	_____	_____
Treasurer:	_____	_____
Secretary:	_____	_____

NINTH

In Witness Whereof, this report is signed by the president, (or secretary) of the said corporation this _____ day of _____, 192—, President.

The date appointed for the next annual meeting of the stockholders is the _____ day of _____, 192—.

No. 24. ANNUAL CERTIFICATE TO CLERK OF CIRCUIT OR CORPORATION COURT.
This is to certify as follows:

FIRST

The principal office of this corporation is [give the county or city, or street and number, if any].

SECOND

The last annual meeting of the stockholders was held on the _____ day of _____, 192—.

THIRD

The following is a list of the officers and directors of such corporation elected at said annual meeting:

Officers:	Residences.
_____	_____
_____	_____
_____	_____
Directors:	
_____	_____
_____	_____
_____	_____

In Witness Whereof, said corporation has caused this certificate to be signed by its president and secretary, and its corporate seal hereto affixed, the _____ day of _____, 192—.

[Affix Corporate Seal Here.]

_____, President.
_____, Secretary.

No. 25. STATUTORY FORM OF ACKNOWLEDGMENT ON BEHALF OF A CORPORATION
(Code, § 5207.)

State (or *territory* or *district*) of _____, County (or *Corporation*), of _____, to-wit: I, _____, a _____ (here insert the official title of the person certifying the acknowledgement) in and for the State (or *territory* or *district*) and county (or *corporation*) aforesaid, do certify that _____ (here insert the name or names of the persons signing the writing on behalf of person or corporation, or the name of the person signing the writing in a representative capacity), whose neame (or *names*) is (or *are*) signed to the writing above, bearing date on the _____ day of _____, has (or *have*) acknowledged the same before me in my own county (or *corporation*) aforesaid. My commisions expires _____.

Given under my hand this _____ day of _____.

_____ N. O., N. P. (or other officer).

It is suggested that the above form, though sufficient for recordation, might not be sufficient for other purposes; so we give the form below also. (P's Code B. 1920, p. 233.)

No. 26. FULLER FORM OF ACKNOWLEDGMENT ON BEHALF OF A CORPORATION
(Pollard's Code Biennial 1920, p. 233.)

State of Virginia, }
City of Richmond, } to-wit:

I, John Smith, a notary public in and for the city and State aforesaid, do certify that John Jones, whose name as president of the _____ corporation, is signed to the foregoing writing, bearing date on the _____ day of _____, 192—, personally appeared before me this day in my said city and in the name and on behalf of the said corporation acknowledged the said writing as the act and deed of the said corporation, and made oath that he is president of the said company and that the seal affixed to said writing is the true corporate seal of said corporation and that it has been affixed thereto by due authority.

My term of office expires _____.

Given under my hand this _____ day of _____, 192—.

_____ N. O., N. P. (or other officer).

No. 27. EXECUTION OF DEED BY A CORPORATION
(Code, § 5208, as amended by Acts 1920, p. 586; Pollard's Code Biennial 1920, p. 234.)

In witness whereof the _____ corporation has caused this deed to be signed, acknowledged, and delivered in its name by _____ its president (or *acting president* or *vice-president* or person authorized hereunto by the board of directors of said corporation) and its corporate seal to be hereto affixed and attested by _____, its

secretary (*acting treasurer or treasurer or person duly authorized hereunto by the board of directors of the said corporation*) on the day, month and year first above written.

[Affix Corporate Seal Here.]

Attest:

By _____, President.
_____, Secretary.

No. 28. RETURN ON PROCESS OR NOTICE SERVED ON OFFICER OF A DOMESTIC CORPORATION.

(Code, §§ 6063 (as amended by Acts 1922), 6066, 6020, 2835.)

Executed on the _____ day of _____, 192—, by delivering a copy of the within process (or *notice*) to P. A., president (or other chief officer, or *vice-president, general manager, cashier, treasurer, secretary; general superintendent or a director*, or on a local agent appointed by power of attorney, or on any officer or agent found in the county or city where the principal office is located) of _____, a domestic corporation of Virginia, at _____, in _____ county, wherein he resides (or *his place of business is or the principal office of the corporation is located*).

X. Y., Constable (or *sheriff* or
J. R., deputy for X. Y.,
sheriff) of _____ county.

No. 29. RETURN ON PROCESS OR NOTICE SERVED ON AGENT OF A DOMESTIC OR FOREIGN CORPORATION.

(Code, §§ 6064, 6066, 6020, 2825.)

Executed on the _____ day of _____, 192—, by delivering a copy of the within process (or *notice*) to A. T., a depot or station agent, (or *a telephone or telegraph operator, or a toll-gatherer*) on the _____, a domestic (or *foreign*) corporation of Virginia, at _____ in _____ county, wherein he resides and wherein the action (or *suit or other proceedings*) was brought or commenced (or *wherein is located the principal office of such company*).

X. Y., Constable (or *sheriff* or
J. R., deputy for X. Y.,
sheriff) of _____ county.

Service on the statutory agent may be as a process or notice is served generally.

No. 30. VOLUNTARY SURRENDER OF FRANCHISE BEFORE PAYMENT OF ANY CAPITAL STOCK.

(Va. Code 1919, § 3809; Pollard's Code Biennial 1920, p. 164.)

We, the undersigned, being all the incorporators named in the certificate of incorporation of _____ the charter of which was issued by the State Corporation Commission on the _____ day of _____, 192—, do hereby certify that no part of the capital stock of the corporation has been paid, and that the

business for which the charter was secured has not been begun, and do hereby surrender all our corporate rights and franchises, and file this, our certificate, verified by oath, in the Clerk's office of the State Corporation Commission, so that the said corporation shall stand dissolved, according to section 3809 of the Code of Virginia 1919.

State of Virginia,

of _____, to-wit:

Subscribed and sworn to before me by _____
this _____ day of _____, 192—.

Notary Public.

No. 31. TWO-THIRDS CONSENT TO DISSOLUTION.
(Va. Code 1919, § 3810, as amended by Acts 1918, p. 99; Pollard's Code Biennial 1920, p. 165.)

At a meeting called for that purpose, held at _____ on _____, 192—, after notice served on each director as required by law, a resolution was adopted by a majority of the whole board that in the judgment of the Board of Directors it was deemed advisable and for the benefit of _____, a corporation organized and existing under the laws of the Commonwealth of Virginia, that it should be dissolved.

Within ten days after the adoption of such resolution, the said Board of Directors caused notice of the adoption thereof to be mailed to each stockholder of record, and beginning within the said ten days caused a like notice to be published at least _____ a week for _____ successive weeks in _____, a newspaper published at _____ Virginia, of a meeting of the stockholders to be held at _____ Virginia, the principal office of the corporation on _____, 192—, to take action upon the said resolution.

Pursuant to said notice, this meeting of the stockholders is held at the time and place specified _____

and there are present in person, or represented by proxy, _____ shares out of a total of _____ shares, issued and outstanding; and we, the undersigned, who represent at least two-thirds in interest of the stockholders hereby consent that the said dissolution shall take place, and hereby signify our consent in writing, in person and by proxy as follows:

NAME	OWNING OR REPRESENTING	NO. OF SHARES
_____	_____	_____
_____	_____	_____

CORPORATIONS

We, the undersigned, President, Secretary and Treasurer, respectively, of _____, do hereby certify under the seal the following is a list of the names and residences of the officers and of the corporation affixed hereto, and attested by its Secretary, that directors of said corporation:

OFFICERS.

NAME.	TITLE.	RESIDENCE.
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

DIRECTORS.

NAME.	RESIDENCE.
_____	_____
_____	_____
_____	_____
_____	_____

and we do hereby further certify that the foregoing is a true and accurate statement of the action of the directors and stockholders, with the written consent of at least two-thirds in interest of the stockholders, all of which is filed in the office of the Clerk of the State Corporation Commission to the end that a good and sufficient Certificate of Dissolution may be issued.

In witness whereof we hereto set our hands and cause the seal of the corporation to be hereto affixed and attested by the Secretary this _____ day of _____, 192—.

_____, President.
_____, Secretary.
_____, Treasurer.

Attest: _____, Secretary.

STATE OF VIRGINIA,

_____ of _____, to-wit:

I, _____, a Notary Public in and for the _____ and State aforesaid, do certify that _____, President, _____ Secretary, and _____, Treasurer, whose names are signed to the writing above, bearing date on the _____ day of _____, 192—, have acknowledged the same before me in my _____ and State aforesaid.

My term of office expires on the _____ day of _____, 192—. Given under my hand this _____ day of _____, 192—.

_____, Notary Public.

No. 32. UNANIMOUS CONSENT TO DISSOLUTION.
(Code § 3810, as amended by Acts 1918, p. 99, Pollard's Code
Biennial 1920, p. 167.)

We, the undersigned, being all the stockholders of _____,

a corporation organized and existing under the laws of the Commonwealth of Virginia, do hereby consent to the dissolution of the said corporation and file this, our said consent, in the office of the State Corporation Commission, in order that the said Commission may issue a certificate whereby the dissolution of said corporation shall be effected.

NAME.	NO. OF SHARES.	NAME.	NO. OF SHARES.
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

I, _____, President of the _____

do hereby certify that that the signers to the above consent to the dissolution of this corporation are all the stockholders of said corporation of record as of this date.

Witness my signature as President of the aforesaid corporation, under the seal of said corporation, attested by the Secretary of the said corporation this _____ day of _____, 192—.

[SEAL]

_____, President.

Attest:

_____, Secretary.

STATE OF VIRGINIA,

_____ of _____, to-wit:

I, _____, a Notary Public in and for the _____ and State aforesaid, do certify that, _____, President and _____, Secretary, whose names are signed to the writing above, bearing date on the _____ day of _____, have acknowledged the same before me in my _____ and State aforesaid.

My term of office expires on the _____ day of _____.

Given under my hand this _____ day of _____, 192—.

_____, Notary Public.

No. 33. FORM FOR OBTAINING NEW CHARTER WITHIN THREE YEARS AFTER DISSOLUTION FOR FAILURE TO PAY REGISTRATION FEES. ETC.

(Va. Code 1919, § 3811; Pollard's Code Biennial 1920, p. 168.)

Certificate of Incorporation of the _____

This is to certify that at a special meeting of the Stockholders of the _____ duly called for the purpose, by stockholders representing not less than one-tenth (1-10) of the capital stock of the Company, and held at the office of the Company, on the _____ day _____, at which meeting _____ shares of the capital stock of the said company were represented in person or by proxy, the following preamble and resolutions were adopted by a vote of more than two-thirds in interest of all the stockholders:

WHEREAS, the charter of this company seems to have been annulled and revoked by reason of the failure of the company to pay, as required by law, the annual registration fees for which it is liable,

and to make the annual reports of its status, business and conditions for the years _____, as prescribed by the State Corporation Commission in accordance with the laws of the State, and

WHEREAS, the properties of the company have not been disposed of and its business and operations are still being carried on, and it is desired to remove all doubt as to the validity of the said charter, and to revive and continue the corporate existence and powers of the said _____

NOW THEREFORE be it

RESOLVED, that (here name not less than three persons) who are hereby chosen for the purpose, are authorized and directed to execute and acknowledge a certificate for a new charter for this Company as provided by section 3811 of the Code of Virginia 1919.

In accordance with the said preamble and resolution, and by virtue thereof and of said section of the Code, we the undersigned do hereby make application for a new charter for the _____ for the purpose of reviving and continuing the corporate existence and powers of said corporation, and by this our certificate do set forth the same name, powers and amount of capital stock, as contained in the charter of said company, which it is alleged has existed and been revoked and annulled as aforesaid, which said charter was on the _____ day of _____, by the State Corporation Commission certified to the Secretary of the Commonwealth of Virginia for recordation: to-wit (here insert name, powers, amount of capital stock, etc., as set forth in charter as amended, if there have been any amendments.

Given under our hands, this _____ day of _____, 192—.

STATE OF VIRGINIA,

County of _____, to-wit:

I, _____, a notary public in and for the county and State aforesaid, do hereby certify that _____ whose names are signed to the foregoing writing bearing date on the _____ day of _____, 192—, have acknowledged the same before me in my County aforesaid.

My commission expires on the _____ day of _____, 192—.

Given under my hand this, the _____ day of _____, 192—.

Notary Public.

VIRGINIA.

In the _____ Court of the _____

The foregoing certificate of incorporation of the _____ was presented to me _____ Judge of the _____ in vacation (or term) and having been examined by me I now certify that the said certificate for incorporation is, in my opinion, signed and acknowledged in accordance with section 3811 of the Code of Virginia 1919.

Given under my hand, this the _____ day of _____ 192—.

Judge.

No. 34. PETITION FOR RE-ISSUE OF LOST CERTIFICATE OF STOCK.
(Code, §§ 3818-19, new form approved by Corporation Court of Lynchburg. Furnished by S. A. Harris, Attorney-at-Law, Lynchburg, Va.)

To the Honorable F. P. Christian, Judge of the Corporation Court of the City of Lynchburg:

Your petitioner, Geo. O. Morgan, respectfully represents, that he is the owner of Ten Shares of Stock of the J. W. Ould Company, whose principal office is located in the city of Lynchburg, Virginia, and that said corporation was duly chartered, incorporated and organized under the laws of the State of Virginia. The certificate for said stock was issued on the _____ day of _____, 192—, and was numbered _____ and was for Ten Shares of the preferred stock of said corporation, of the par value of One Hundred Dollars, (\$100.00) per share, and its market value is the same that it was about seven years ago. Petitioner left the said stock certificate in a bureau drawer at his home at 611 Court Street, in said city and his health being bad he went to Battle Creek, Michigan and other places for treatment, and was away for about two years, his said house being rented out during that period, and when he returned he could not find the said certificate for the stock, and has made diligent search for it, but has still been unable to find it, and that it is lost or destroyed; that he has applied to said corporation and they have refused to issue a new stock certificate therefor to him.

Wherefore, and for as much as your petitioner is otherwise without sufficient and adequate remedy, he prays that said corporation may be summoned to appear before your honor's court at such time and place as may be fixed by the court to show cause, if any, it can, why it should not issue to petitioner a new certificate of stock in the place and stead of the certificate so lost and destroyed, and that a new certificate for said stock be required to be issued to him by said corporation and that an order may be entered requiring said corporation to issue to him a new certificate for said stock herein described, and that all such other, further and general relief may be granted your petitioner as the nature of his case may require.

P. P., Petitioner.

No. 35. ORDER REQUIRING CORPORATION TO RE-ISSUE LOST
CERTIFICATE OF STOCK.

(*Idem.*)

In the Corporation Court for the City of Lynchburg.

Geo. O. Morgan, Plaintiff,

vs.

J. W. Ould Company, Inc.

It appearing to the Court that a copy of the order of Sept. 3rd, 1919, heretofore entered in this proceeding, and served on the defendant, J. W. Ould Company, Inc., more than five days, prior to this day requiring the said defendant to show cause at this time and place why it should not issue to the plaintiff, Geo. O. Morgan, a new certificate of stock in the place of the one described in his petition here-

tofore filed herein, and the court having now this day heard the proofs and allegations in behalf of all the parties in interest relative to the subject matter of inquiry set up in said petition, and mentioned in said order, and upon such hearing the court being satisfied that the petitioner is the lawful owner of ten shares of the preferred capital stock of said Corporation, J. W. Ould Company, incorporated, of the par value of \$100.00 per share, and that a stock certificate therefor number 6, was heretofore in the 20th day of July 1910 issued to said Geo. O. Morgan, plaintiff, by said Corporation, J. W. Ould Company, Inc., defendant, and that said certificate of stock since it was so issued has been lost or destroyed and cannot be found and that no sufficient cause has been shown why a new certificate therefor should not be issued to said Geo. O. Morgan, by said Corporation in place thereof; it is hereby adjudged and ordered that the said J. W. Ould Company, Inc., be and it is hereby required within 30 days from this date to issue and deliver to said Geo. O. Morgan, a new certificate for the number of shares of the preferred capital stock of said Corporation, specified in said order of Sept. 3rd, 1919, as owned by said Morgan, and the certificate for which has been lost or destroyed, the same being as aforesaid, for ten shares of the preferred capital stock of said Corporation, of the par value of \$100.00 per share.

And the said plaintiff, Geo. O. Morgan, is hereby directed and required to file before this court a proper bond in the penalty of \$_____, payable to the Commonwealth of Virginia and with such surety as may be approved by this court, and conditioned to indemnify and save harmless any person, or persons, who shall hereafter appear to be the lawful owner of such certificate so stated to be lost or stolen or destroyed.

And thereupon the said Geo. O. Morgan, appeared before this court at this time and place, and entered into and filed said bond, with _____ as his surety.

And all the objects of this proceeding being accomplished it is ordered stricken from the docket.

COSTS

See Justice of the Peace; Sheriffs, Sergeants, Constables, etc.; Fees of Officers and Witnesses

§ 1. In criminal cases.—See titles above, and Code, §§ 4954-66, as to "Taxation and Allowance of Costs in Criminal Cases."

§ 2. In civil cases.—See titles above, and Code, §§ 3517-37, (§ 3527 repealed by Acts 1912 amending § 3504), as to "Costs Generally, and Allowance to Witnesses."

CO-TENANTS

See Partition; Partnership

I. JOINT TENANTS

- § 1. Definition
- § 2. Unity of interest, title, time, and possession
- § 3. Conveyance by a co-tenant
- § 4. Joint tenants must sue and be sued jointly
- § 5. Liability of one co-tenant to others for waste or profits
- § 6. Supervisorship between joint tenants abolished
- § 7. Terminating a joint tenancy

II. TENANTS BY ENTIRETIES

- § 8. Definition; converted by statute into tenants in common

III. TENANTS IN COMMON

- § 9. Definition
- § 10. How tenants in common sue and are sued
- § 12. Liability of one tenant in common to others for waste or profits.
- § 12. Conveyance by tenant in common
- § 13. Terminating a tenancy in common

IV. TENANTS IN CO-PARCENARY

- § 14. Definition
- § 15. How parceners sue and are sued
- § 16. Liability of one parcener to others for waste or profits
- § 17. Conveyance by co-parcener—see section 3, above
- § 18. Terminating a tenancy in co-parcenary

There are four cases of co-tenants, as follows:

I. JOINT TENANTS

§ 1. **Definition.**—A joint tenancy is where real estate is conveyed or willed to two or more persons in fee simple, for life, for years, or at will. The interest and possession of each extend to every part of the whole, as is the case of the other three instances of co-tenancies. (1 M's Real Prop., § 878.)

§ 2. **Unity of interest, title, time and possession.**—Joint tenants have one and the same interest or estate, arising by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. The various incidents or consequences of joint tenancy depend upon this unity and entirety of interest, each tenant owning the whole jointly and nothing separately, but with power to transfer in equal shares, (1 M's Real Prop., §§ 880-5.)

§ 3. **Conveyance by a co-tenant.**—A joint tenant or any

co-tenant may transfer his undivided interest, by deed or will to his co-tenant or to another (Code, §§ 5141, 5746-7, 5155). If he conveys by metes and bounds, it operates to pass his undivided interest (see Code, § 5148).

§ 4. Joint tenants must sue and be sued jointly.—Yet it has been held a joint tenant may sue a stranger in a separate action of ejectment for his share of the land (100 Va. 120). But one joint tenant cannot sue another for trespass; nor in ejectment, unless there is proof of an “actual ouster or of some other act, amounting to total denial of the plaintiff’s right as co-tenant” (Code, §5466).

§ 5. Liability of one co-tenant to others for waste or profits.—If a joint tenant, tenant in common, or parcener commit waste, he is liable to his co-tenants, jointly or severally, for damages, and if it be done wantonly, or wilfully, he is liable to double damages; and if done by a tenant in possession, pending a suit to recover or charge the land, with knowledge of the suit, treble damages may be recovered. Provision is also made to prevent further waste (Code, §§ 5507, 5509, 5511). For further as to waste, see, also, *Landlord and Tenant*, section 5, (11).

As to profits received by one co-tenant, by statute omitted by the Revisors 1919, but re-enacted in 1920 (Acts 1920, p. 28), an action of account may be maintained “by one joint tenant, tenant in common, or co-parcener, or his personal representative, against the other as bailiff, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common,” but not against the personal representative of a parcener, he being omitted. Notwithstanding the statute, the usual procedure is by bill in equity. (1 M’s Real Prop., §§ 891, 922.)

§ 6. Survivorship between joint tenants abolished.—Formerly where one joint tenant died his interest survived or accrued to the others, but now by statute (§ 5159) when a joint tenant dies, before or after the vesting of the estate, whether the estate be real or personal, or whether partition should have been compelled or not, his part descends to his heirs, or passes by will, or goes to his administrator or executor, subject to debts, curtesy, dower, or distribution, as if he had been a tenant in common (see section 9, below); but section

5160 says the above section does not apply to joint executors or joint trustees, nor where it manifestly appears from the tenor of the instrument that it was intended the part of one dying should then belong to the others; neither does the above section affect the mode of proceeding on any joint judgment or decree in favor of, or on any contract with, two or more, one of whom dies. (M's Real Prop., §§ 892-3.)

But abolishing survivorship does not abolish joint tenancies, which still continue with all their other incidents (22 Gratiot 443).

§ 7. Terminating a joint tenancy.—This is done by destroying one of the three unities of title, estate, and possession, the unity of time not being capable of being destroyed. The unity of title may be destroyed (as to his interest) by the transfer of the tenants share to one of his co-tenants or to a stranger; the unity of estate is destroyed by a transfer of a part of one joint tenant's estate or interest to a co-tenant or a stranger, or by the acquisition of the inheritance by one of two joint tenants for life or for years; and the unity of possession is destroyed by voluntary or compulsory partition. As between the new tenant's interest and the others, they are tenants in common, except in the case of partition (see *Partition*). 1 M's Real Prop., §§ 894-900.)

II. TENANTS BY ENTIRETIES

§ 8. Definition; converted by statute into tenants in common.—A tendency by entireties is where an estate in land is conveyed or willed, after marriage, to a husband and his wife jointly, who could be joint tenants but for the fact the husband and wife are in law one person, which makes them take the estate entirely as one individual; and where another takes along with them, they took only one share. But by statute in 1850 as to estates of inheritance, and in 1887 as to any estate (see Code, 1919, § 5159), "if hereafter any estate, real or personal, be conveyed or devised (willed) to a husband and his wife, they shall take and hold the same by moieties (halves) in like manner as if a distinct moiety (half) had been given each by a separate conveyance," unless indeed § 5160) "it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others." The effect of the statute is to convert the tenancy by entireties into a tenancy in common, thereby

destroying survivorship which existed at common law, and enabling each consort to transfer his or her share during the marriage, just as tenants in common might do. (See sections 9 and 12, below). Question, whether, where a deed or will is made to a husband and wife and another person, the statute changes the common law rule, which gives the husband and wife one-half and the third person the other half. (1 M's Real Prop., §§ 906-11.)

III. TENANTS IN COMMON

§ 9. Definition.—A tenancy in common is where two or more hold the same land, with interest accruing under different titles; or accruing under the same title at different periods; or conferred by words importing that the grantees are to take distinct (through undivided) shares or "share and share alike," etc. When estates in joint tenancy (see section 8, above) or in co-parcenary (see section 14, below) are broken up, they become tenancies in common. (1 M's Real Prop., §§ 913-29.)

§ 10. How tenants in common sue and are sued.—Holding severally an undivided share, at common law tenants in common might sue or be sued severally, except as to personal actions (as, for injuries done to the premises) the action must be joint. By statute (§ 6099), "Tenants in common may join or be joined as plaintiffs or defendants"; but, as Mr. Minor observes, as at common law, they may also sue and be sued separately. (1 M's Real Prop., § 921.)

§ 11. Liability of one tenant in common to others for waste or profits.—See section 5 above. Notwithstanding the statute (see section 5, above providing an action of account, every tenant in common has a right to possess, use, and enjoy the common property severally, accounting to his co-tenants, under the statute, for the rents and profits received; and where one uses the property to the total or partial exclusion of the others, the best measure of his accountability to them is their share of a fair rent of the property so occupied and used by him (16 Grat. 21, 52, 54; 19 Grat. 38, 39), although circumstances may make it proper to resort to other modes of adjustment between the co-tenants (7 Leigh, 720; 16. Grat. 21, 54; 104 Va. 269).

§ 12. Conveyance by tenant in common.—See section 3, above.

§ 13. Terminating a tenancy in common.—This is done by all the co-tenants uniting in conveying their shares to a co-tenant or to a stranger, such holder of all the shares becoming at once possessed in severalty; or by voluntary or compulsory partition. (1 M's Real Prop., §§ 927-8.)

IV. TENANTS IN CO-PARCENARY

§ 14. Definition.—A tenancy in co-parcenary or parcenary is where lands come by descent to two or more persons as co-heirs, called co-parceners or parceners (see Code, § 5264).

§ 15. How parceners sue and are sued.—Suits by them or against touching the right to the property descended to them must be joint, except as to descendants of parceners suing for the recovery of their interests.

One parcener cannot sue another for trespass, as each is entitled to the possession of the whole. (1 M's Real Prop., §§ 936-8.)

§ 16. Liability of one parcener to others for waste or profits.—See section 5, above.

§ 17. Conveyance by co-parcener.—See section 3, above.

§ 18. Terminating a tenancy in co-parcenary.—This is done by one parcener transferring his share to a co-tenant or to a stranger; or by the union of all the shares by descent in one parcener; or by voluntary or compulsory partition. (1 M's Real Prop., §§ 942-6.)

COUNTIES

For new counties, county expenditures, bounds of counties, how to sue and be sued, and magisterial districts, see Code, §§ 2674-95.

COURTHOUSE, CLERK'S OFFICE AND JAIL

See Jailor

For the subject generally, see Code, §§ 2854-80, and Acts 1922, amending § 2854. For act requiring clerks to keep telephones in their offices, see Acts 1918, p. 534.

COURTS (GENERAL PROVISIONS AS TO)

For chapter as to, see Code §§ 5958-83. For vacation powers and proceedings, see Code, §§ 6307-9.

As to money in hands of court unclaimed, see Code, §§ 6310-14, and Acts 1920, p. 510.

COURTS OF RICHMOND, NORFOLK AND ROANOKE

§ 1. **Richmond courts.**—For special chapter as to, see Code, §§ 5912-33, and Acts 1920, p. 77, amending § 5917.

§ 2. **Norfolk courts.**—For special chapter as to, see Code, §§ 5934-45.

§ 3. **Roanoke courts.**—For special chapter as to, see Code, §§ 5946-57, and Acts 1918, p. 754, amending § 5947.

§ 4. **General provisions as to courts.**—
See *Courts (General Provisions as to)*.

CREDIT UNIONS

§ 1. **Purpose of union.**—The purpose of these loan and savings institutions is to accumulate the savings of its members, make loans to members for provident purposes, and generally to conduct a credit union as hereinafter provided. (Acts 1922, p.—, § 1.) They are a kind of “little banks.”

§ 2. **How chartered.**—By eight residents executing, filing, and recording a certificate as in the case of corporations in general—(see *Corporations*, section 4). The corporate name must include the words “credit union,” and other distinguishing word or words shall be used. (Id., § 1.)

The use of the words “credit union” by others is punishable by a fine of \$10 to \$100 for each day used and may be stopped by injunction. (1 Id., § 3.)

§ 3. **By-laws; amendments.**—The unions must at once

adopt a set of by-laws and file a copy with the banking department of the State Corporation Commission. When these are approved by the Chief Bank Examiner, the minimum capital stock subscribed, and all requirements of law as to organization are complied with, the commission issues a certificate to commence business.

The by-laws must specify: "(a) The date of the annual meeting, which must be in January, requirements as to notice and manner of conduct of meeting; (b) the number of directors, not less than 5, shareholders and members, their powers and duties, and the compensation and duties of all officers; (c) the conditions and qualifications for membership; the number of members of the credit committee and the supervisory committee, with their respective powers and duties; (e) the conditions upon which shares may be issued, transferred, and withdrawn; (f) the charges, if any, to be made for failure to meet obligations punctually; (g) the conditions upon which deposits may be received and withdrawn, and whether the corporation shall have the power to borrow; (h) the manner in which the funds of the corporation may be invested; (i) the conditions upon which loans may be made and repaid; (j) the method of receipting for money paid in on account of shares, deposits or loans; (k) the manner in which dividends shall be determined and paid out.

"The State Corporation Commission, through the chief bank examiner, shall have the power to require the credit union to amend or change its by-laws, should such seem desirable, and upon the refusal of any credit union so to do, its license to operate shall be suspended by the State Corporation Commission.

"The by-laws when so approved and filed shall be the by-laws of the corporation and no amendments shall be operative unless same shall conform to the provisions of this act and be approved by the chief bank examiner." (Id., §§ 1, 2.)

§ 4. Powers.—"The credit union may receive the savings of its members in payment for shares or on deposit; may loan to its members or may undertake such other activities relating to the purposes of the corporation as its charter or by-laws may authorize, not inconsistent with the provisions of this act." (Id., § 4.)

§ 5. Membership.—"The membership of the corporation shall consist of the incorporators and such persons, societies, associations, partnerships and corporations as have been duly elected to membership and have subscribed for one or more shares and have paid for the same in whole or in part, together with the entrance fee as provided in the by-laws and have complied with such other requirements as the certificate of organization and by-laws may contain." (Id., § 5.)

§ 6. Deposits.—"A credit union may receive the savings and deposits of its members in such amounts and upon such terms as the board of directors may determine and the by-law shall provide. "A credit union may also receive deposits from non-members, subject to such terms as the by-laws may provide." (Id., § 15.)

§ 7. Rates of interest.—"A credit union may lend to its members at reasonable rates, or invest as hereinafter provided, the funds accumulated. The rates of interest shall not exceed one and one-half per centum per month computed on unpaid balances." (Id., § 16.) "One and one-half per centum per month" is 18 per cent. per year, while the regular banks can charge for loans only 6 per cent., except where they act as brokers in getting money, when an additional brokerage may be charged, or where they act under the "Small Loan Laws"—see *Interest and Usury*, section 2, and *Loans Not Over \$300*.

§ 8. Power to borrow.—"If the by-laws so provide, a credit union shall have the power to rediscount, as hereinafter provided, or to borrow money from any source in addition to receiving deposits as indicated in section 15, but the aggregate amount of rediscounts and borrowings shall at no time exceed the sum total of the capital, surplus and reserve funds of such borrowing credit union." (Id., § 17.)

§ 9. Investment of funds.—"The capital, deposits, undivided profits and reserve fund of the corporation may be invested in the following ways, and in such ways only: (a) Lent to members of the corporation in accordance with the provisions of this act; (b) deposited to the credit of the corporation in other credit unions chartered by this State, State banks or trust companies, incorporated under the laws of this State, or in national banks operating in this State; (c) not more than 10 per centum of the capital stock and reserve fund

of a credit union may be invested in the stock of other credit unions; (d) invested in any investment which is legal for savings banks in the State of Virginia." (Id., § 18.)

§ 10. Loans.—"As provided in section 18, a credit union may loan to its members for such purposes and upon such security and terms as the by-laws shall provide and the credit committee shall approve; but security must be taken for any loan in excess of \$50. Endorsement of a note or assignment of shares in any credit union shall be deemed security in the meaning of this section.

"A member who needs funds with which to purchase necessary supplies for growing crops may receive a loan in fixed monthly installments instead of in one sum.

"The supervisory committee shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from a credit union or become surety for any other member whose application for a loan is under consideration.

"All officers and members of any committee in any way knowingly permitting or participating in making a loan of funds of a credit union to a non-member thereof shall be guilty of a misdemeanor. The credit union shall have the right to recover the amount of such illegal loans from the borrower or from any officer or member of committees who knowingly committed or participated in the making thereof, or from all of them jointly.

"A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business." (Id., § 19.)

§ 11. Taxation.—"A credit union shall be deemed an institution for savings, and together with all accumulations therein shall not be subject to taxation, except as to real estate owned. The shares of credit unions shall not be subject to any stock transfer tax, either when issued by the corporation or when transferred from one member to another." (Id., § 26.)

§ 12. Other provisions of the act.—For reports, examinations and supervision, see Acts 1922, p.—, § 6; fiscal year and meetings, and regulations as to voting, § 7; election and oath of directors, § 8; officers and their compensation, § 9; credit committee, § 10; supervisory committee, § 11; capital,

par value of shares, entrance fee, and transfer fee, § 12; shares and deposits of minors and in trust, § 13; charges and penalties, § 14; reserve fund, § 20; dividends, § 21; notes, drafts, and bills of exchange, § 22; expulsion and withdrawal, § 23; voluntary dissolution, § 24; change of place of business, § 25.

CRIMINAL LAW AND PROCEDURE

See *Arrest*, and "Arrest, Commitment, and Bail", under *Justice of the Peace* (div. V.); *Bail*; *Coroner's Inquest*; *Costs*; "*Due Process of Law*"; *Evidence*; *Fees of Officers and Witnesses*; *Fines*; *Fugitives from Justice*; *Justice of the Peace*; *Justices in Cities and Towns*; *Pardon*; "Peace and Good Behavior" under *Justice of the Peace* (div. VIII.); "Recovery of Fines before a Justice", under *Justice of the Peace* (div. VII); "Search Warrants", under *Justice of the Peace* (div. IX.); "Trial of Misdemeanors", under *Justice of the Peace* (div. VI.); for particular offenses, see separate titles

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I. CRIMES GENERALLY

§ 1. **Who may commit crime.**—All persons are capable of committing crime, except in some cases of defect or want of will or understanding.

(1) *Age of responsibility.*—Under 7 one is *incapax doli* (incapable of crime), for in presumption of law, he has no discretion whatever, and against this presumption nothing can be heard. Over 14 one is *capax doli* capable of committing crime). Between 7 and 14, it depends on the apparent power to discern between good and evil. *Prima facie*, one so young is not capable, but *malitia supplet aetatem* (malice supplies age.) The evidence of malice, however, must be clear. Children of 12, 11, 10, 9, and one of 8, have been capitally punished. Modern humanity, however, would revolt against such severity, and if a jury could be brought to convict an offender so youthful as the oldest of these, executive clemency would in general be interposed to commute the death penalty at least. Under 14, a male infant is presumed to be physically incapable of rape, and therefore cannot, it seems, be guilty of it, the law presuming such infant impotent as well as wanting in discretion. But he may be principal in the second degree, by being present, aiding and abetting in the offense, and an intelligent evil purpose being shown by the prosecution, which, however, must be clearly established. And by

statute (§4764) a principal in the second degree in felonies is punishable with the same penalty as a principal in the first degree.

For acts of non-feasance (or omission), a minor (under 21) is not responsible, it is said, because, not being in possession of his estate, he lacks the ability. (H's G. & M. p. p. 78, 79.)

(2) *Idiocy*.—An idiot is one who has had no understanding from his birth. Persons deaf, dumb, and blind from birth, wanting thus the usual inlets of sense, are still not necessarily without intelligence, as was once supposed; for the humanity of modern times has gone very far to instruct such persons, not only in discerning right from wrong, but in communicating their thoughts by writing and signs; and while incapacity is *prima facie* presumed, he is amenable to punishment wherever it clearly appears that he has the use of his understanding. (H's G. & M. p. 79.) For burden of proof, see under (3) below.

(3) *Lunacy or insanity*.—This is the deprivation of understanding of one who once possessed it, by intoxication, fever, religious mania, or other artificial or adventitious causes; but to be exempt from punishment; the person must be unable to distinguish right from wrong, in respect to the particular act, any more than an ordinary child under 14. Melancholy—insanity partial in degree—incited by excessive and unwarranted griefs or fears, not depriving of reason, does not excuse. Monomania—insanity partial as to objects—excuses, but only where the act is the immediate offspring of the disease, and this, however circumscribed the delusion, the accused not being conscious that the act was wrong, but not so then, unless he would be legally excused if the delusion were a reality. Permanent total insanity exempts from punishment in all cases; as, also, total insanity with lucid intervals, as to acts committed during a period of insanity, and none others.

As to burden of proof, the law presumes every man to be sane, and the who alleges idiocy or insanity must prove clearly the person was a *non compos mentis* (person of unsound mind) at the time of the act charged against him; it is not enough merely to raise a rational doubt on the subject. (H's G. & M. p. p. 80, 81, 82.)

(4) *Drunkenness*.—The madness produced by voluntary drunkenness does not excuse, but rather aggravates the offense; save only that where the material question is whether the act was premeditated or upon sudden impulse, the person's intoxication may be considered. But settled insanity produced immediately by intoxication, exempts from responsibility. Involuntary drunkenness, brought about by the contrivance of enemies or by casualty exempts from punishment, if it unsettles the reason. (H's G. & M. p. p. 81, 82.)

(5) *No will exerted*.—Acts done by misfortune or chance, not by design, the will being neutral, are not criminal. Neither is accidental mischief resulting from the proper performance of a lawful act. But otherwise, where the accidental mischief results from the doing an unlawful act; where such act is a misdemeanor, the mischief is the same, whether the mischief would have been a misdemeanor or a felony had it been done purposely; where the unlawful act is a felony, the mischief is a felony or misdemeanor according to what it would have been had it been done purposely. Acts done in ignorance or mistake of fact, are excused—e. g., intending to kill a burglar in his house, one kills, by mistake, a member of his family. But mistake of law is no excuse—e. g., erroneously thinking he has a legal right to kill another (for instance one trespassing on his land, or insulting his family), he does so, it is wilful murder; for *ignorantia juris neminem excusat* (ignorance of the law excuses no one), since every man is irrefutably presumed to know the law. (H's G. & M. p. 82.)

(6) *Offenses by married women*.—The wife is not, in general, punishable for acts done in her husband's presence, because she is presumed to act under his coercion, which however, does not import that he is punishable therefor, and he is not unless he appears actually to have instigated the acts. But it is well established that this presumption of coercion is only *prima facie*, and may be repelled by proof to the contrary. and the wife held liable. The wife is punishable for treason, felonious homicide, and robbery, notwithstanding her coverture and the presence of her husband, because of the heinousness of those offenses and the necessity of protecting society against their commission; and she may be punished, also for keeping a *brothel*—house of ill-fame—because that relates to the domestic economy of the house, and is, moreover, generally

conducted by the arts of the female sex. A married woman, for acts done, not in the husband's presence, is punishable as if she were unmarried, except that if the offense is punishable by fine only, the husband must be joined in the prosecution, because upon conviction he must pay it. And it seems to a corollary to this proposition that in no case can a fine (even with other punishment) be imposed upon a married woman unless her husband has been joined in the prosecution. And it would seem that the emancipation of married women from their common law liability to receive conveyances of land, to contract, and sue and be sued, does not change her criminal responsibility.

The wife may be accessory before the fact, by persuading or advising her husband to commit an offense, but not an accessory after the fact by receiving him, the law in that instance recognizing her domestic allegiance and the impulses of conjugal affection to be paramount to her social duty. which doctrine with us is confirmed by section 4765 of the Code.

A wife cannot be guilty of any offense against her husband's property, because husband and wife are one person in law, and at marriage he endowed her with a kind of interest in all he possessed. Even a stranger taking the husband's goods with the wife's privacy, is not guilty of larceny, unless he were her paramour. (H's G. & M. pp. 83, 84.)

(7) *Compulsion*.—A person who commits crime under compulsion of direct force of another is, in general, exempt from punishment. Also, crime under *duress per minas*—compulsion though fear—is excused, except murder, treason, robbery, and perhaps generally crimes peculiarly mischievous to mankind. The threats which constitutes *duress per minas* are such as would induce a firm man, not given to timidity, to fear death or great bodily harm, under circumstances where the law can afford no protection, and not merely to fear having his house burned or his goods spoiled.

Acts done under compulsion of law are excused; as, where an officer disperses rioters, who resist, attempts to execute a warrant of arrest, or the like, he is justified though he kills the person.

Compulsion by hunger or want affords no excuse for crime, because of the evil consequences of a contrary doctrine in

affording loop-holes for the easy escape of criminals. (H's G. & M. p. 86.)

§ 2. Degree of guilt.—The several degrees of guilt are as principals, either in the first or second degree; and accessaries either before or after the fact.

(1) *Principal in the first degree.*—He is the actor or absolute perpetrator of the crime, whether present at the time, or absent, having prepared the means beforehand—e. g., poison, pitfall, and the like. (H's G. & M. p. 85.)

(2) *Principal in the second degree.*—He is one, not the perpetrator, but present aiding and abetting the fact done, or keeping watch or guard at some convenient distance. He may be tried along with the principal offender, or before or after him, and punished as the principal in the first degree. The warrant may charge all indiscriminately, or one as committing and the others as aiding and abetting. (Code, § 4764; H's G. & M. p. 86; M's G. (25-6) 9-10.)

(3) *Accessaries.*—An accessary before the fact is one, absent at the commission of a felony, but who procures, encourages, counsels, or commands another to commit it; while an accessary after the fact is one knowing a person to have committed a felony, relieves, receives, comforts, or assists him; but in misdemeanors there are no accessaries—all are principals and proceeded against as such. Accessaries apply only to felonies—except treason and unpremeditated offenses (which, from the nature of things, can have no accessary before the fact.) They are proceeded against either along with the principal, or separately, and punished whether the principal be convicted or not, or is amenable to justice or not. By section 4765 of the Code, servants and certain relatives of the offender, cannot be accessaries after the fact. (Code §4766; H's G. & M. pp. 86-88.) For when and where tried, see Code, §4766.

§ 3. Grade of offenses.—By section 4758 of the Code: "All offenses are either felonies or misdemeanors. Such offenses as are (or may be—89 Va. 570) punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors." For distinction between misdemeanors and mere penalties or fines, see Justice of the Peace, div. VII., section 3.

§ 4. Punishment of misdemeanors.—By section 4782 of the Code: “A misdemeanor, for which no punishment or no maximum punishment is prescribed by statute, shall be punished by fine not exceeding \$500 or confinement in jail not exceeding 12 months, or both, in the discretion of the jury or of the justice, or of the court trying the case without a jury.” This includes common law, as well as statutory misdemeanors—see Code, § 4760.

§ 5. Limitation of prosecutions.—“A prosecution for committing, or procuring another person to commit, perjury, shall be commenced within three years next after the perjury was committed; and a prosecution for a misdemeanor, or any pecuniary fine forfeiture, penalty, or amercement, shall be commenced within one year next after there was cause therefor, except that a prosecution for petit larceny may be commenced within five years, and for an attempt to produce abortion, within two years after commission of the offense. Nothing in this section shall be construed to extend to any person fleeing from justice.” (Code, § 4768.)

An indictment for felony is dismissed where three regular terms, of the court has passed without a trial, except in certain cases named in the statute. (Code, § 4926.) He must be indicted before the end of the second term, except in certain named cases. (Code, § 4880.) See section 11, (11) and (12), below.

§ 6. Offense against two or more statutes or two or more ordinances.—“If the same act be a violation of two or more statutes, or of two or more municipal ordinances, conviction under one of such acts or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a Federal statute a prosecution or proceeding under the Federal statute shall be a bar to a prosecution or proceeding under the State statute.” (Code, § 4775, as amended by Acts 1920, p. 99.)

See valuable note to this section in the Code, by the Revisors.

§ 7. Other sections of Code.—Death penalty is imposed only where so provided by statute—§ 4759.

Common law offense is punished only as prescribed by statute—§ 4760. As to benefit of clergy and petit treason to be punished as murder—§ 4761.

No corruption of blood or forfeiture of estate by suicide or attainder of felony—§ 4762.

Felony not to merge civil remedy—§ 4763.

Where prosecuted, if offense committed without and made punishable within the State—§ 4769; or if committed near boundary of two counties—§ 4771; or if death ensues in another county—§ 4772.

Acquittal by jury on merits, a bar to further prosecution—§ 4773; when acquittal not a bar—§ 4774.

How accused must be convicted of felony—§ 4776.

How term of confinement, or amount of fine, of person convicted of felony is ascertained—§ 4783; who to ascertain the punishment in criminal cases tried by jury—§ 4784.

In convictions for two or more offenses, confinement to commence after previous term expires—§ 4786.

Clerks to keep registers of descriptive lists of persons convicted of felony, etc.; form of register; photographs of convict may be taken; copies of list or photographs to be evidence of identity, etc.—§§ 4787-8.

II. GRAND JURY

§ 8. Statutory provisions.—See Code, §§ 4851-64, and Acts 1920, p. 597, amending § 4853.

§ 9. Constructions of statutes and other matters.—

(1) *Disqualification to be pleaded in abatement.*—If any member of the grand jury is not duly qualified, all its actions are invalidated, but this objection, as also to the mode of summoning them, must be made by plea in abatement, before pleading to the merits, unless it can be verified by the records of the court. It cannot be made for the first time in the appellate court.

But if the disqualification be discovered before the grand jury completes its duties, he may be discharged, and another sworn, and the body will then be legally constituted. If the plea in abatement be found in favor of the defendant, judgment is, that he be not compelled to answer the indictment, but depart the court without delay; if against him, it is final in misdemeanors, but respondeat ouster in felonies, except that in either case, if it be found against him on demurrer to his plea,

or to the replication thereto, being a question of law, the judgment is respondeat ouster. (H's G. & M. pp. 531-2.)

For qualification and exemption, see Code, §§ 5984-5, which § 4927 makes applicable in criminal cases.

(2) *Special grand jury.*—The statute (§ 4854) does not require the order to be entered of record. Under this section (§ 4854) and section 4851, special grand juries may be summoned and impaneled at any regular or special term, when so ordered by the judge. (26 Grat. 976; 114 Va. 872.)

(3) *Supplying deficient jurors.*—A plea in abatement will not lie because the court, upon a sufficient number of the jury summoned not attending, causes the required number to be returned from the county at large. (76 Va. 1007.)

(4) *Finding indictment.*—(a) On what evidence indictment found. The grand jury hears only the Commonwealth's witnesses, whose testimony must be upon oath and legal evidence; and before finding or making an indictment or a presentment, they ought to be thoroughly persuaded of the guilt of the accused, or in the rather strong language of Prof. Minor, "convinced of his guilt beyond a rational doubt."

(b) *Omission to endorse witnesses not fatal.*—The omission by the grand jury to write the names of the witnesses on whose testimony an indictment is found, at the foot thereof, is no ground for quashing the indictment.

(c) *Who may be present in grand jury room.*—A plea in abatement will not lie because the sheriff or his deputy, or, it would seem, the Commonwealth's attorney, was in the grand jury room when they were deliberating and examining witnesses, upon whose testimony the indictment was found; but as to an outsider being in the grand jury room during their deliberations, there seems to be some doubt.

(d) *Finding of grand jury to be publicly presented and recorded.*—The presentments and indictments must be brought into court by the grand jury and publicly presented and recorded. They are usually endorsed "a true bill" by the grand jury and signed by the foreman; but such endorsement is not necessary, nor does it affect the validity of the indictment that there is no endorsement at all, or a meaningless one, such as "a true gun"; for it is the record of the finding of the jury,

upon the order book of the court that ascertains the authenticity of the accusation.

When the finding is so recorded, the indictment or presentment then becomes as much a part of the record as if it were spread *in extenso* on the order book; but in case of a presentment, it is the practice so to spread it.

An omission to record the finding cannot be supplied by the indictment or presentment or the endorsement thereon, nor by the recital in the record that he "stands indicted," nor by his arraignment or plea of not guilty; nor can it be corrected at a subsequent term of the court; for the record of the finding is as essential as the recording of the verdict of a petit jury. (H's G. & M., pp. 531-2; 115 Va. 945.)

III. INDICTMENT, ETC., AND PROCESS THEREON

§ 10. Statutory provisions.—For chapter as to "Presentments, Indictments, and Informations and Process Thereon," see Code, §§4865-92.

§ 11. Construction of statutes and other matters.—

(1) *Presentment.*—A presentment at common law is nothing more than instructions by the grand jury to the proper officer of the court for framing an indictment for an offense which they find to have been committed; which, when prepared, is submitted to them, and upon their finding it a true bill the presentment merges in the indictment and the prosecution commences; but if such officer declines framing an indictment, the presentment ceases to exist for any purpose.

But in Virginia, under the statute, a presentment has the character in itself of a criminal proceeding, until embodied and merged in an indictment for the same offense, or in an information filed upon it; and, though less formal than an indictment, it may stand in the place thereof, and on it a prosecution for a misdemeanor may proceed without indictment or information. But the presentment must contain matter criminating the defendant, and charge the offense with at least reasonable certainty; otherwise it cannot avail for any legal purpose whatever, not even as the foundation for an information. (H's G. & M., p. 536.)

For the cases in which a presentment should be used, and the proceedings thereon, see section 4888 of the Code.

(2) *Information*.—Informations are of two kinds: (1) Informations *qui tam*, brought, at common law, by an informer as well for the Commonwealth as for himself, to recover penalties going in part to each, being a sort of *qui tam* actions, only that they are carried on by criminal instead of civil process; but such informations are superseded in Virginia (Code, § 2543, as amended by an act 1920, p. 319; §§ 2544, 4866), by (2) informations in the name of the Commonwealth alone, which are proper in prosecutions for any misdemeanor, as well as for fines going either wholly or in part to the Commonwealth; and the indorsement of the informer's name at the foot of the information when it is filed, secures to him his share of the fine—otherwise it goes to the Commonwealth.

An information differs from an indictment in that the latter is sanctioned by the finding of a grand jury, whereas the former is the mere allegation of the attorney prosecuting for the Commonwealth; also an indictment can never be altered in substance, while an information may be amended at any time before trial; but the offense must be charged with the same certainty and particularity in the one as in the other. A motion to show cause why an information should not be filed, may be made at any term of the court and without notice thereof, and if the application is sufficiently grounded, the motion is granted and the rule goes accordingly. On the return day of the rule, or at the term to which it may have been enlarged, if the defendant, by affidavit or otherwise, show no sufficient cause against it, the court makes the rule absolute, and grants leave for the filing of the information, and proceedings thereupon are as on an indictment for a like offense; but if good cause be shown against the filing of the information, the rule is discharged.

For "upon what an information is grounded," see next section.

(3) *Indictment*.—An indictment is a written accusation of a crime preferred to, and presented on oath by, a grand jury. The accusation or bill is found by the prosecuting attorney, and sent, together with the proofs relied on to sustain it, to the grand jury. An indictment is necessary for felonies, and may be, and frequently is, used for misdemeanors; and in either case, it must be in court at the trial, for if it be lost,

though after arraignment and plea, the accused cannot be tried. It must be sufficiently certain and precise, and is governed generally by the common law rules and principles of pleading in civil cases, except so far as it may be controlled by statute. (H's G. & M. p. 537-8.)

For description of offense in indictments, or other accusations, see Code, §§ 4869-75, 4879.

(4) *Upon what an information is grounded.*—By the English practice at common law, an information was grounded upon a proper legal affidavit, explicit and full, setting forth all the material facts of the case, and all matters necessary to criminate the defendant; but from a very early period in Virginia practice, a presentment often took the place of the affidavit required by the English rule, yet it was required like the affidavit, to contain every matter necessary to render the act imputed to the defendant unlawful, and describe the offense with at least reasonable certainty; otherwise, it avails for no legal purpose whatever, and may be quashed, unless, indeed, where there is no motion to quash, and an information is filed thereon and pleaded to. But it is no good reason against granting leave to file an information that a motion to quash the presentment has been overruled, nor that process to answer the presentment has been issued; yet, if in motions for such leave, there is any likelihood of injustice, or anything inequitable, being inflicted upon the defendant, the court, in the exercise of its discretion, will always refuse the leave; so also it will be refused when an indictment has already been found, even though it be quashed for insufficiency, or for the disqualification of a grand jury. (See Code §4866.)

Since 1870 we have had the higher authority of an express statute for grounding an information upon presentment, as well as upon an indictment, or the affidavit of a competent witness. Also, upon the certificate of the committing justice? (H's G. & M. p., 538. See also, Code §§ 3366 and *seq.* (as to enforcement of forfeiture), and §§ 584 and *seq.* (as to *quo warranto* proceedings).

(5) *Prosecutor.*—See Code, §§4867-8, 2547, 4958.

(a) *Omission to endorse prosecutor not fatal.*—An omission to write the name of the prosecutor, if there be one,

at the foot of the presentment, indictment, or information, is no ground for quashing the accusation.

(b) *Who a prosecutor, and when security required of him.*—A prosecutor is a voluntary informer, and if he be endorsed as a prosecutor, it is too late, after verdict, to show the contrary by parol testimony. His insolvency is ordinarily, good cause for ruling him to find security for costs; but if the court believes public justice requires the prosecutor to proceed, it may refuse to dismiss the accusation, though the prosecutor be insolvent, and security for costs be not given.

(c) *Prosecutor liable for costs, though indictment quashed.*—Judgment may be given against the prosecution in favor of the defendant for his costs, even though the indictment be quashed for a disqualification of a grand juror. (H's G. & M., p. 539.)

(6) *Allegations as to particular offenses named.*—See Code, §§ 4869-73.

(7) *Unnecessary allegations.*—See Code, § 4874.

(a) *Length, breadth, or depth of wound need not be alleged.*—In an indictment for murder it is not necessary to set out the length, breadth, or depth of the wound; for, if alleged, it is unnecessary to prove it as alleged, or even that the wound was in the same part of the body in which it is alleged to have been.

(b) *Time need not be alleged unless material.*—The common law requires day and year of all material facts to be alleged, and if there is a limitation, the allegation and proof must be within the period limited; but it is not necessary, in general, to prove the time alleged, unless it enters into the nature of the offense. Nor is it error that dates in an indictment are set out in figures, instead of words; nor, indeed, can any mode of stating the time of an offense in an indictment vitiate it. (See next section.)

(c) *Particular place need not be alleged unless material.*—The common law requires the particular parish, ville, hamlet, or place, within the county where the offense was committed, to be alleged, yet the allegation was satisfied by proof of the offense at any place therein; but this requirement has long been reduced to alleging simply the county or corporation over which the court has jurisdiction, unless, indeed, where the

place may be a necessary part of the description of the offense. (H's G. & M. p. 540.)

(8) *What defects in indictments not to vitiate them.*—See Code, § 4875.

(a) *Object and scope of the statute.*—This section declares that “no indictment or other accusation shall be quashed or deemed invalid” for any of the certain causes therein enumerated, and therefore dispenses with formal allegations in an indictment; and so far as the statute extends (and it seems to extend to most, if not all, defects of form), it cures the indictment against any objection, however raised.

(b) *Demurrer for insufficiency in law.*—The same defects or imperfections of form or substance, may be taken advantage of upon a general as upon a special demurrer, made *ore tenus*, and so the objection intended to be insisted on, need not be stated. But a demurrer to an indictment of two counts, being general, and not to each count thereof, if either count is good, it is properly overruled. A demurrer to an indictment will be sustained for misjoinder or duplicity; but the most usual cause for demurrer is the omission of some of the legal constituents of the offense meant to be charged. (See (9), (c), below.)

(c) *Judgment upon the demurrer being overruled.*—If the motion is refused, and the demurrer overruled, the judgment, in felony cases, is respondeat ouster, and in case of misdemeanors, the accused is allowed to withdraw his demurrer and to plead, and if he does not do that, judgment is entered against him.

(d) *Motion to quash, when to be made.*—A motion to quash an indictment, being merely *ex gratia*, should be made at an early stage; and if delayed until after plea of not guilty, its reception or rejection is within the trial court's discretion. But the prosecution may make the motion at any time, it would seem, before trial.

(e) *Motion to quash denied except in clear cases.*—A motion to quash an indictment is addressed to the sound discretion of the court, and will be denied, especially in prosecutions for felonies and other serious offenses, except upon the clearest and plainest ground as where the court has no jurisdiction, where no indictable offense is charged, or

where there is some other substantial and material defect; otherwise, he is left to his demurrer, motion in arrest of judgment, or writ of error.

(f) *What omission in caption of an indictment not fatal.*—Though the name of the county be left blank in the caption of an indictment, it is enough if the county be stated in the body of it; and the statement, in the commencement of an indictment, of the name of the court and the term at which it was found, if not surplusage, is useless. But a good practice would be to name the state, county, or corporation, and the court and term thereof.

(g) *Counts for murder may allege inconsistent modes of death.*—An indictment for murder will not be quashed because the death is stated in several counts, as having been occasioned in different and inconsistent modes.

(h) *Misnomer of defendant cured by amendment.*—A misnomer of the accused is available at common law only by plea in abatement, put in before pleading to the merits; but under the statute, the count may, before, or in the course of the trial, cause the accusation to be amended. See (9), below.

(i) *Misnomer of third person is fatal.*—But a material variance as to a third person, who is not a party, is fatal.

(j) *Indictment must conclude contra pacem.*—An indictment for a misdemeanor, (but not a presentment therefor—119 Va. 867), or felony, or any count thereof, will be quashed for omitting the constitutional conclusion, “against the peace and dignity of the Commonwealth” (Va. Const. §106); but a motion to quash a presentment on that ground should be overruled, if the attorney for the Commonwealth ask that a rule for filing an information be issued upon it. The conclusion *contra formam statuti* was formerly necessary to indicate that the proceeding was upon a statute; for if the matter charged was no offense at common law, the court would not look to see if it was an offense by statute, without that conclusion. (H’s G. & M. pp. 541-3.)

(9) *Amendments.*—See Code, § 4876-7.

(10) *When judgment not to be arrested or reversed.*—See Code, §4879.

(a) *Object of this statute of jeofails.*—By the common law, what was error before verdict, was equally exceptionable after verdict, by writ of error or motion in arrest of judg-

ment; and so the numerous grounds for demurrer at common law before limited by our statute (see (7) and (8), above) together with the over-easy ear given to them by the courts—in tenderness of life and liberty—served as loop-holes for the escape of many criminals, and led Lord Hale to complain bitterly of “this overgrown curiosity and nicety” of the common law, which, as he observed “is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy.” Such was the state of the law in Virginia until, in 1804, this statute of *jeofails* was enacted as a remedial law for the disease engendered by the over-nice practice of the common law courts, and was intended to cure those defects which did not put the rights of the commonwealth or the accused in jeopardy, but not to introduce carelessness or laxity in pleading, nor to subvert or disturb any of the great principles by which the common law regulates the pleadings in criminal cases. So that, notwithstanding the statute, an indictment must still allege the offense with such fullness and precision that the defendant may know for what he is prosecuted, and thereby be enabled to prepare his defense, and further, that his conviction or acquittal may be pleaded in bar of any further prosecution for the same offense.

The defect is cured by verdict when “female” is used instead of the statutory phrase “woman child,” in an indictment for rape; so, also, when an indictment in charging the time in a case in which it was material, omits “r” in the word “three.”

But the causes for demurrer are now so far limited by laws enacted since the statute of *jeofails*, that most of the defects cured by the statute will not be fatal upon demurrer. (See (7) and (8), above); yet not so as to misjoinder or duplicity in pleading.

(b) *Judgment arrested or reversed for errors of record.*—At any time between the verdict and judgment the defedant may move the court in arrest of judgment for any error appearing in the record, being generally for some uncertainty or defect in the indictment or other accusation; or it may be for want of jurisdiction.

Anything which is a good cause for arresting judgment

is good cause for reversing it, though no motion in arrest is made.

(c) *With what certainty offense described.*—If the offense is not charged with the particularity required by the statute of *jeofails*, judgment will be arrest or reversed; and it would seem, at least as a general rule, that no greater precision in describing the offense is required under the present state of the law in Virginia, upon a demurrer than upon a motion in arrest of judgment, and that, as to the sufficiency of the description of the offense, nothing is waved by omitting to demur, or cured by the finding of a verdict. (See (8), (a), above.)

All the constituents of the offense, common law or statutory, must be set forth with precision. Hence, it is safe to set forth a statutory offense in the very words of the statute, though synonymous words will sometimes suffice. If, in following the language of the statute, the indictment charges, expressly or by necessary implication, every fact necessary to constitute the offense, it is sufficient. But if the offense, at common law or by statute, is defined in general terms, the indictment must charge it specifically and descend to particulars.

Whenever the facts stated in an indictment or other accusation may all be true, and yet the accused not be guilty of the offense intended to be charged against him, the accusation is insufficient, for no indictable offense is charged.

What comes by way of *proviso* in a statute must be insisted on for the purpose of defense by the accused, and it is not necessary to allege in an indictment that the defendant is not within the *provisos* in the statute. But when exceptions are in the enacting part of a law it must be charged that the defendant is not within any of them.

(d) *Certain technical words required.*—In some crimes, particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it, and the omission thereof is fatal. Thus:

In treason, "traitorously."

In murder, "murdered with malice aforethought."

In burglary, "burglariously."

In felonies generally, "feloniously." (H's G. & M., pp 543-4.)

(11) *Accused discharged from imprisonment if not indicted in time.*—See Code, §§ 4880.

An indictment must be found, in case of misdemeanor, before the end of second term of court after commitment, or in case of felony, before the second regular or special grand jury term thereafter; otherwise, the accused may be discharged from imprisonment, but not forever discharged; and it suffices that any indictment be found within the prescribed time; also, the exceptions enumerated in the statute are not intended to exclude others of a similar nature, or *in pari ratione*. (H's G. & M., pp. 545-6.)

(12) *Within what time indictment for felony must be tried.*—See Code, § 4926.)

The word "terms" means actual sessions of the court, not stated times when it should be held. There must be the prescribed number of terms after a continuance for the prisoner; or continued default for that period, on the part of the Commonwealth, not excused for any of the causes enumerated in the statute, or for others of a similar nature, or *in pari ratione*. (H's G. & M. p. 619.)

(13) *Process.*—See Code, §§4881-92.

The summons need not state the offense fully. The object of the summons is to give the party notice that he is prosecuted for an offense of a particular character, and to apprise him of the time when and the place where he must appear and make his defense. The detail of the particular facts charged, with the accompanying circumstances of time and place, is supplied by the accusation; thus, it is sufficient to summon defendant to answer "for unlawful gaming at cards." (H's G. & M. p. 576.)

IV. TRIAL AND ITS INCIDENTS

§ 12. **Statutory provisions.**—See Code, §§ 4893-4928, and Act 1920, pp. 24, 509, 826, amending §§ 4895, 4910, 4928, respectively and Acts 1920, p. 507, amending §§ 4909, 4912-13.

§ 13. **Construction of statutes and other matters.**—

(1) *Arraignment, plea, and issue.*—(a) *Arraignment*

is the calling of the prisoner to the bar of the court to answer an indictment, and consists of: 1st, Calling the prisoner to the bar by his name, and commanding him to hold up his hand, or, as is the permissible practice in Virginia, to stand up, this ceremony being for the purpose merely of identifying him; 2nd, reading the indictment to him in the English language, or, if not acquainted with that, then in such tongue as he understands; and 3rd, demanding of him whether he be guilty or not guilty; and if he pleads "not guilty," the ancient practice of asking "how will you be tried?" and the consequent answer, "by God and the country," has long been omitted in Virginia upon the recommendation, in 1816, of the superior courts of law.

Two prisoners may be arraigned together, which does not prevent their pleading separately, and electing to be tried separately, for arraignment and pleading are distinct things. (H's G. & M., p. 579.)

(b) *The various defenses the accused may make.*—Upon his arraignment the accused may present either: (1) A plea to the jurisdiction of the court; (2) a demurrer to the indictment for insufficiency in law; (3) a plea in abatement of the indictment; (4) a special plea in bar; or (5) a plea of not guilty.

(aa) *Plea to the jurisdiction.*—Thus, if one stands indicted for an offense of which a justice has exclusive jurisdiction, this plea is proper.

(bb) *Demurrer.*—Thus, when an indictment charges the stealing of property not a subject of larceny; when it fails to show, in case of perjury, that the evidence given by the accused was material; or when it omits some of the legal constituents of the offense meant to be charged—see (8), (b) above). (H's G. & M., p. 579.)

(cc) *Plea in abatement.*—See section 9, above.

(dd) *Special plea in bar.*—E. g., former acquittal or conviction.—See Code, §§ 4773-4. Special pleas in bar are such as without denying the defendant's guilt, go to the merits of the accusation and give a reason why he shall not answer the charge at all nor put himself upon trial for the crime alleged, as when he presents: (1) A plea of *autrefois acquit*, or former acquittal, a plea recognized at common law

and now affirmed by statute, and grounded on the universal maxim of the common law that no man is to be put in jeopardy more than once for the same offense, but the former acquittal must have been on the merit and for the identical offense; or (2) a plea of *autrefois convict*, or former conviction, depending on the same principle as the last named plea, and, like it, must be for the same identical offense or one included therein as a necessary constituent, or as a matter of aggravation proved in the former conviction.

The accused may plead several pleas at the same time if they are not essentially repugnant one to another, and if any special plea be found against him, the judgment is, in felony cases, *respondeat ouster*, a man being allowed to be convicted of felony on no other plea or defense than that of not guilty; and even in misdemeanor cases, although no judgment of *respondeat ouster* is ever given, nor is the accused entitled as of right to plead not guilty after his special pleas have been found against him, yet he will usually be permitted to do so.

(ee) *Plea of not guilty.*—This is a plea to the merits, or the general issue, and upon it alone the accused can have judgment for felony. (H's G. & M., pp. 579-80.)

(c) *How issue joined in felony and misdemeanor cases.*—Issue is joined, in prosecutions for misdemeanors, very much as in civil cases, by means of the formula of a *similiter* on the side of that party who accepts the issue tendered by the adversary.

In a prosecution for a felony, issue is joined very informally. The clerk, having read the indictment to the accused asks him, "How say you, are you guilty or not guilty?" to which the accused replies, "Not guilty." (H's G. & M., pp. 580-1.)

(2) *Continuance.*—See Code, §§ 4893, 5971-3. The reason assigned for a continuance must be proved in general, by the oath of the defendant or some one else, and the court should be satisfied that the accused has used all proper diligence to prepare for trial; that the cause alleged endangers injustice being done to himself if a continuance were denied; and that there is a reasonable probability that a continuance will enable him to make the desired preparation for trial. The

most usual ground on which a continuance is asked is the absence of material witnesses, who have been duly and reasonably summoned. Repeated applications for continuance from term to term are viewed with increasing suspicions, and then not only will the accused be required to state what he expects to prove by the absent witnesses, but he must, in all respects, bring himself clearly within the rule above stated. The motion is addressed to the sound discretion of the court, and it is only when it clearly appears to an appellate court that the discretion has been improperly exercised that a writ of error for that cause will be awarded.

The continuance of a case, on motion of accused, to another term, passing over an intermediate term, is not error. (H's G. & M., p. 601.)

(3) *Presence of accused at trial, &c.; tried by jury and other privileges.*—See Code, §§ 4894, 4888-9, 4892.

(a) *Presence in felony cases.*—By the common law, as by statute, a person accused of felony must be arraigned and must plead in person, and in all the subsequent proceedings he must likewise appear in person, and not by attorney—a right which he cannot waive—and such appearance in court must be shown by the record; yet it is not required that it be formally stated that he was present, for that may be inferred from the record, as for instance, when the record says, “and thereupon the accused was remanded to jail”—this is sufficient to show his presence that day.

But neither the common law nor the statute requires his personal presence at the making of any order touching his case before arraignment; nor when the jury, which have been sent out for the night, is brought in in the morning to consider of their verdict.

(b) *Presence in misdemeanor cases.*—At common law, the appearance of the accused, in misdemeanor cases, when the punishment is corporal, must be entered, but it may be by attorney as well as in person, and even though the accused be an infant, this rule still holds, it being a fatal error for him to appear by *guardian ad litem*; also, no judgment of imprisonment or other corporal punishment can be rendered unless the defendant is present when the sentence is pronounced, and this must appear by the record of the court, or it will be reversed

on writ or error. But by statutes in Virginia (Code, §§ 4883, 4888-9, 4899; see 122 Va., 783), such presence is no longer necessary, and a *capias* to hear judgment is abolished.

(c) *Constitutional rights of accused.*—By section 8 of the Constitution, it is declared: "That no man shall be deprived of his life, or liberty, except by the law of the land, or the judgment of his peers; nor shall any man be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense, but an appeal may be allowed to the Commonwealth in all prosecutions for the violation of a law relating to the State revenue. That in all criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty", and provision is therein made for pleading guilty in any case, without a jury, and the trial without a jury by the court, or a justice (where so provided by the Legislature), or misdemeanors. See, also, Code, § 4927.

(aa) "*Law of the land*"—see "*Due Process of Law*."

(bb) *Self-crimination.*—The provision (Va. Const., § 8) that no man shall be "compelled in any criminal proceeding to give evidence against himself," is intended to prevent inquisitorial proceedings to establish guilt; and applies not only when the person himself is on trial, but in all other cases, (24 Grat. 624). Nor can he be required to waive his right by any suggestion that he shall not be prosecuted, nor is his right affected by his having previously testified before the grand jury (85 Va. 892). Yet, where a statute affords a complete immunity from prosecution, our court has held (Lacy and Richardson. J. J., *dissentiente*), that a witness may be compelled to testify even though thereby he is exposed to infamy and disgrace. (78 Va. 490.) And to the same effect is the decision of Supreme Court of the United States, (151 U. S. 591, Justices Shiras, Gray, White, and Field dissenting). See 2 Va. Law. Reg. 117, 314; 2 Hurst's Va. Dig. 189-90, sec. 7 and note; 3 Id. 817, sec. 29 and note.

Now it is held without dissent, that where full indemnity is given, witness must testify. And where he testifies before

a grand jury which makes no indictment, he may nevertheless claim his exemption (113 Va. 775).

The mayor's merely asking a prisoner, without threat or promise, to write the name forged, is not compelling him to testify against himself (81 Va. 374.)

The right of a witness to decline to answer is not at all affected by the suggestion that he might answer yes or no without giving any reason for his answer (110 Va. 897.)

(cc) "*Twice in jeopardy*."—This provision appears for the first time in the new Constitution, and is declaratory of the common law. The United States Constitution (5th Amendment), which says "Nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb," does not apply to State courts, but only to Federal courts. Yet, the common law maxim, on which this constitutional provision is supposed to be founded, does exist in Virginia, and extends not only to "life and limb," but to all criminal cases. (20 Grat. 848, 853-4; see 10 Va. L. R. 410, 419, 461; and §§ 4773-4, of Code.)

The maxim rests upon technical notions of jeopardy, and not upon the principles of *res adjudicata*; but that doctrine has been held applicable to the accused, though not to the Commonwealth (81 Va. 209, 218.)

Where accused appeals, he waives his former jeopardy (91 Va. 732).

Where a mayor and the court has concurrent jurisdiction, a trial by the mayor bars any further prosecution, (Bryan's case 101 S. E. (Va.) 316).

When the purpose of an appeal in a criminal case is to procure on behalf of the State a reversal of the judgment and a new trial of the accused (as distinguished from a mere review and decision of the legal question involved for use as a precedent in future cases), the rule against a second jeopardy for the same offense operates *propria vigore* to destroy the right of appeal. The matter is jurisdictional, and the accused is not obliged to first abide the result of the appeal, and, in the event of a reversal, resort to his plea of *autrefois acquit* or *autrefois convict* to avoid a second trial (124 Va. 805).

Whatever view may prevail in other jurisdictions, in this State the rule against putting any person in jeopardy more

than one time for the same offense is to be applied in all criminal cases, regardless of the character and degree of the punishment (124 Va. 805).

For a comprehensive digest of the Virginia decisions, relative to "former jeopardy," see titles *Autrefois Acquit* and *Autrefois Convict*, 1 Hurst's Va. Dig. 650-60, and other later digests.

(dd) "*Confronted with the accusers and witnesses.*"—The Supreme Court of the United States has held (174 U. S. 21), that a statute, providing that the record of conviction of principal felons shall be conclusive proof, against one charged with receiving stolen goods, that the goods have been stolen, is unconstitutional as violating the provision of the 6th Amendment, declaring that the accused shall be "confronted with the witnesses against him." But this amendment does not change the common law rule that the testimony of a witness, sworn and examined on a former trial of the same indictment, who has since died, may be read against the prisoner on a second trial (156 U. S. 237). The reasoning of the court, in this case (page 243) would equally apply to dying declarations (which have been recognized in Virginia, in numerous cases, as admissible evidence, though the constitutional question seems not to have been raised; the principle being laid down that the Constitution is not to be interpreted literally, but 'in the light of the law as it existed at the time it was adopted—not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charter." And such is the generally accepted doctrine (Cooly's Const. Lim. 74-80, 388; 5 Va. Law. Reg. 49). But, in Virginia, it seems to have been held that in a criminal prosecution, proof of what a dead witness or one absent from the state, swore on a former trial, is not admissible (Rand. 701, 708; 10 Grat. 732-4).

The right of an accused to be confronted with the witnesses against him is held, (see 5 Va. Law Reg. 637), to be violated by ordering him to be placed 24 feet away from the prosecuting witness, where he could not see or hear the witnesses or see the jury, although this was done to protect the witness, who was a small girl, from being intimidated by him.

For further as to this subject see, also, 104 Va. 860; 108 Va. 873; 109 Va. 118; 111 Va. 870.

(ee) *Right to jury trial*.—This right can neither be waived by, nor denied to, the accused (88 Va. 618). But a colored person is not entitled to a mixed or colored jury (33 Grat. 845). See, also, 86 Va. 46; 88 Va. 618; 91 Va. 322; 116 Va. 484; 121 Va. 812; 122 Va. 816-17; section 2, clause 3, article III., of the U. S. Constitution, declaring that the trial of all crimes, except in cases of impeachment, shall be by jury," and the 6th amendment—a parallel provision to section 8 of the Virginia Constitution,—applies only to Federal courts (91 Va. 322).

(ff) "*Speedy trial*."—"Speedy" does not mean immediate, but without undue delay, by which is not meant the delay necessarily incident to proceedings conducted according to prescribed forms (*e.g.*, in taking an appeal), but unnecessary delay in taking the successive steps in such proceedings. (91 Va. 726). The legislative interpretation of what is meant by a speedy trial is shown by the statute (§ 4926), providing that a prisoner charged with a felony, who without legal cause, has been denied a trial for so many terms of the court, shall be forever discharged; and this interpretation has several times received the sanction of the Court of Appeals. (8 Grat. 561; 91 Va. 726; 91 Va. 782; 98 Va. 803). See 7 Hurst's Digest, 463-7, sec's 2 and 3, and notes, and other later digests, for a collection and digest of all the cases in point.

(gg) *Right to counsel*.—The Virginia Court of Appeals express the opinion (92 Va. 794), that every person accused of crime has a constitutional right to have counsel to aid him in making his defense, which right cannot be denied him; and that case holds that if the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is no ground of reversal, unless it further appears that the right to have counsel was denied; it is not to be presumed that the right was denied.

In the Federal Constitution (6th Amendment), and in all the states, except Virginia, there is a constitutional guaranty of the right to have counsel; and as the 6th Amendment to the United States constitution applies (as, in fact, all the first ten Amendments do) to the Federal government only (123 U.

S. 131; 139 U. S. 651; 142 U. S. 155; 6 Va. Law Reg. 9), there seems to be no constitutional guaranty of the right to have counsel in Virginia. The argument of Mr. Benjamin Watkins Leigh, as *amicus curiæ*, in an early case, (3 Leigh, 743), contains a learned discussion of the right to be heard by counsel, but he avouches no constitutional provision to maintain the right.

At common law, a person indicted for treason or felony was not entitled to defense by counsel on the general issue. This was changed at an early period by legislation and judicial decision in England, and by statute in Virginia, (3 Rob. Prac. 228; 1 Rev. Code 1819, p. 607, sec. 27). It seems rather remarkable, in this State, that while the right of the accused to counsel, in such cases, was expressly provided by statute until 1878 (Va. Code 1849, p. 773, sec. 2; Va. Code 1860, p. 835, sec. 2; Acts 1866-67, p. 932, sec. 2), yet in the revisal of the criminal laws of the State in that year, this provision was omitted, and likewise in the revisals of 1887 and 1919. The present Code (sec. 4842), contains the provisions, as contained in the former Codes, that the accused, upon an examination before a justice, may be assisted by counsel. The general provisions as to attorneys in the present Code seem to be the same substantially as those contained in the Codes of 1849 and 1887. But by statute enacted in 1892 (Acts 1891-92, page 872) it is provided that on the trial of any case, felony or misdemeanor, and before any evidence is submitted on either side, the counsel for the Commonwealth and for the prisoner, respectively, shall have the right to make an opening statement of their case to the jury—see (d), below.

As this matter has escaped the attention, as it seems, of the framers of the new Constitution, the right should be given by statute.

(hh) *Excessive bail or fines and cruel and unusual punishments prohibited.*—See Va. Const., § 9.

This section is an exact copy of article X. of the English Bill of Rights, 1689; and the same with the 8th Amendment of the U. S. constitution, except "shall" there is used instead of "ought" here, but this Amendment does not apply to the State government.

The imposition and regulation of fines is within the discretion of the Legislature, and its discretion will not be ques-

tioned by the courts, except where the minimum is so excessive as to shock the sense of mankind. The statute (Va. Code 1887, § 1220, now repealed), imposing a penalty of not less than \$100 for charging illegal freights or rates for transportation, is not in conflict with this section, forbidding excessive fines, and the fact that no maximum fine is fixed by the section does not render the act unconstitutional. Excessive verdicts are under the control of the courts. (92 Va. 59.)

A statute providing for punishment by stripes is not unconstitutional (6 Rand. 694); nor death by electrocution (52 L. R. A. 520).

(d) *Other rights and privileges.*—By section 4776 of the Code: "No person shall be convicted of felony unless by his confession in court, or by his plea or demurrer, or by the verdict of a jury, accepted and recorded by the court."

By section 4783: "The term of confinement in the penitentiary, or in jail, of a person convicted of felony, if that punishment is prescribed, and the amount of the fine, if the felony be also punishable by fine, shall be ascertained by the jury, if there be one, or by the court trying the case without a jury, so far as the term of confinement and the amount of the fine are not fixed by law."

By section 4784: "The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law."

By section 4905: "On the trial of any case of felony or misdemeanor, and before any evidence is submitted on either side, the counsel for the Commonwealth and for the prisoner respectively, shall have the right to make an opening statement of their case to the jury."

(4) *Venire facias in case of felony; its tenor; number of jurors, and how selected.*—See Code, § 4895 as amended by Acts 1920, p. 24, and note and annotations to this section in the Code. The amendment re-enacts § 4029 of Code 1887, (as to *venire*, when defendants elect to be tried separately), which the Revisors 1919 omitted, promising the amendment.

(a) *For what venire facias may be quashed.*—A *venire facias* in a felony case will be quashed for errors and irregularities appearing upon its face, or when the directions of the statute are not followed—e. g., when the writ requires a greater or less number than 20 persons to be summoned, or when

they are summoned to appear "for trial of felonies" generally, or when it omits the statutory requirement "residing remote from the place where the offence is charged to have been committed," or says "where the felony was committed," or where the record does not show by whom the list was furnished, or that the writ was directed by the court, or where the return is signed by the deputy, omitting the sheriff's name. But the time for issuing the writ before the sitting of the court is merely directory. (H's G. & M., p. 603.)

(b) *What irregularities cured by verdict.*—The object of this section is to cure any irregularity in the *venire facias*, or in selecting the jury from the persons brought in on the *venire*, or as to competency of juror, or the like; but not to apply to a case when there is in fact no *venire facias* at all—and one is required for every jury in a felony case—for the jury process is an indispensable writ and a part of the "due process of law"; so that, omitting to direct a *venire*, when required, is an error apparent in the record, which cannot be cured by any presumption or waiver, and of which advantage may be taken on motion in arrest of judgment, or for the first time on writ of error in the appellate court; this is on the principle that what is essential must affirmatively appear by the record. But it need not affirmatively appear of record that a *venire facias* for summoning a grand jury was ever issued. (H's G. & M., p. 604.)

(c) *Qualification and exemption of jurors.*—See Code, §§ 5984-5, which § 4927 makes applicable to criminal cases.

(d) *Motion for a venire facias de novo.*—A *venire facias de novo* (i. e., a new writ to summon a new jury), unlike a new trial (granted in discretion for reasons extrinsic to the record), is granted for some defect or irregularity appearing on the face of the record, without discretion in the court to refuse—as follows: (1) For error or irregularity in the proceedings on the *venire facias* in the first trial; and (2) for imperfections in the verdict—e. g., finding for accessory to murder without stating the degree of murder, ascertaining a period of imprisonment not allowed by law, not recording verdict as delivered by the jury, and the like. (H's G. & M., p. 627.)

(e) *When defendants tried jointly; when separately.*—The amendment to section 4895 of the Code (Acts 1920, p. 24)

re-enacting section 4029 of the Code of 1887 (which the Revisors 1919 omitted), provides: "If a person, indicted jointly with others for a felony, elect to be tried separately, the venire summoned for their trial may be used for him who is first tried, and the court shall award a *venire facias* for the trial of the others, jointly or separately, as they may elect."

At common law the Commonwealth and not the prisoner had the right of election, subject to the control and discretion of the court, whether to arraign and try jointly or separately, persons jointly indicted. By statute, persons jointly indicted for felony may elect to be tried separately, as a matter of right; yet if they elect to be tried jointly, the attorney for the Commonwealth or the court may, nevertheless, by virtue of the common law, elect to have a separate trial; so that, whilst in a felony case any and every joint defendant is entitled to a separate trial if he so elect, even against the will of the court or the Commonwealth's attorney, yet joint defendants cannot be tried jointly without the concurrent election of themselves on the one hand and the attorney for the Commonwealth or the court on the other. In a misdemeanor case, being governed by the common law, and not by statute, joint defendants can claim no right to be tried separately, but the attorney for the Commonwealth, subject to the discretion of the court, may elect to try them jointly or separately, as to him may appear proper. (H's G. & M., p. 613.)

(f) *Provisions applicable to civil and felony cases.*—Section 4927 of the Code makes the following sections under "Juries in Civil Cases," applicable to civil and felony cases: Besides §§ 5984-5 (see (c), above), § 5997 (fine for non-attendance); § 6000 (examination as to interest, prejudice, etc., and if not indifferent another supplied); § 6001 (no exception as to "age or other legal disability" allowed after sworn, unless by leave of court); §§ 6088-10 (as to pay of jurors; see also § 4928 on same subject); § 6013 (views by jurors); § 6014 (disclosure by juror).

(g) *Pay of jurors.*—See Code, §§ 4927-8, 6008-10.

(h) *Jury in misdemeanor cases.*—Section 4927 of the Code makes chapter as to "Juries in Civil Cases" (§§ 5984-6014, and Acts 1918, p. 466, amending § 6007, and Acts 1920, pp. 3 and 595, amending §§ 5988-90, and p. 75, amending §

5995), applicable (except § 6002; as to irregularity cured by verdict, and § 6012, as to waiver of jury trial and number of jurors) to misdemeanor cases.

The jury summoned in felony cases, may be used for misdemeanor cases also. (Code, § 4895, as amended by Acts 1920, p. 24.)

(5) *How panel completed in felony case; fine for non-attendance.*—See Code, § 4896.

(a) *For what second venire not to be quashed.*—The court cannot order panel completed without directing another *venire facias*—indeed a new writ is required for each jury; but it is not necessary when the regular panel is incomplete, that the judge should furnish with his new writ a list of the bystanders from whom the required number shall be summoned, much less is it necessary that such list, if furnished, should be signed by him.

If the panel is incomplete, and a tales issues, directing the persons named by the judge to be summoned, “who reside remote from the place where the felony is charged to have been committed,” the introduction of these words into the tales, if not required by the statute, is in accordance with the policy of the law, and does not invalidate the *venire*. And in a *venire facias* to a distant city, the insertion of those words is immaterial. When part only of those summoned are found free from exception, it is not necessary to keep such part together until the panel is complete, and then again examine them on their *voir dire*. When for want of time or other cause the sheriff fails to summon the whole number ordered, his return is valid for as many as are summoned.

(b) *What irregularities cured by verdict.*—See (4), (b), above.

(6) *Challenges of jurors; how tried.*—See Code, §§ 4898-9, 4904.

(a) *Challenge to the array or whole panel.*—A challenge to the array, being for cause shown, may be made on the part of either the Commonwealth or the accused, being an exception taken in writing to the entire panel, on account of default or partiality of the officer who summoned the jury—e. g., when the officer is the prosecutor or party aggrieved, or related to him by blood or affinity, or pecuniarily interested, or when, for any other cause, he is not likely to be impartial, in which

case it is the coroner's duty to summon the jury. (Code, § 2821.)

(b) *Challenge for legal disability, propter defectum or delictum.*—Challenges to the polls *propter defectum* are for want of some necessary qualification of a juror, such as being a minor, a woman, an alien, an idiot, a lunatic, or a person otherwise not entitled to vote and hold office in the county or corporation; but not for being merely exempt from serving on juries. The common law required that jurors should be *liberi et legates homines*, and hence aliens, minors, women, and lunatics have always been excluded. (As women are now allowed to vote, doubtless they shall soon be allowed to sit as jurors.)

A challenge to the polls *propter delictum*, is where a juror has been convicted of treason, felony, conspiracy, bribery in any election, or petit larceny; but a pardon, it would seem, washes away all guilt and therefore places him *in statu quo*.

(c) *Challenge for kin or interest, propter affectum.*—A challenge to the polls *propter affectum*, is made where a juror is of kin either to the accused or the party injured, within the ninth degree, or in his power or employment, or in intimate association with him, or if he is interested in the result, or has been tampered with by either party as to his verdict, or the like, he is disqualified as a juror; and if that appears, the court has no discretion, but must sustain the challenge.

(d) *Challenge for opinion, propter affectum.*—This is likewise a *propter affectum* challenge to the polls, and must be sustained where it appears that the juror has already formed a decided opinion as to the guilt or innocence of the accused. Speaking upon the authority of the decisions of our court of last resort, Mr. Minor states the law in most clear and concise language, as follows: "If the opinion is decided, it is immaterial whence the juror derived it—whether from rumor or having heard the statements of witnesses—or whether he has expressed it or not. But where it is doubtful whether the opinion is a decided one, the source of his information may be an important aid in determining the character and extent of the impression on his mind; and so, also, may the fact of his opinion having found expression. If upon the whole examination it appears that the opinion is decided

or substantial, the juror is incompetent; whilst if it appears to be merely hypothetical—upon the supposition that a certain state of facts will be proved—or be so slight as probably to yield to the evidence, he is competent. It is fair and reasonable to infer—unless the contrary distinctly appears—that the opinion is not decided, but only hypothetical, if it is founded merely upon rumor, and it tends further to confirm this conclusion if the juror declare himself free from prejudice or partiality and capable of giving the accused a fair trial—statements which ought to be believed, unless some reason appears for discrediting them. Nor is a hypothetical opinion less hypothetical because it has existed in the mind for six or seven months or longer, or because the juror says he will ‘stick to it’ unless the evidence shall turn out to be otherwise than rumor has reported it.” A challenge to a juror must likewise be sustained when he has previously been a juror, petit or grand, in the same case.

For peremptory challenge, because opposed to capital punishment, see (j), below.

(e) *When challenge to be made.*—The statute (§§ 6001, 4927) provides that “no exception to any juror on account of his age or other legal disability shall be allowed after he is sworn, unless by leave of the court.” This provision is construed to relate only to those disabilities embraced by statute, and not to other causes of challenge existing at common law, and as to which the statutes are silent; but challenges at common law are governed by the same rule, no challenge being allowed after the juror is sworn except by consent or in the discretion of the court, in order to avoid injustice.

After verdict it is too late to make the objection, unless it shall appear that injustice has been done in consequence of admitting a disqualified juror. Before verdict and after being sworn, a challenge will be admitted only with great caution, and upon a motion made as soon as the cause for it is discovered, with satisfactory proof that it was not known, and could not by due diligence have been known when the juror was sworn.

(f) *Challenges tried by court; upon what evidence it proceeds.*—Challenges are tried at common law by two triers, appointed by the court, or by the court itself, or by other means, according to the kind of challenge; but by statute above

cited, "all challenges shall be tried by the court." The court proceeds upon extrinsic testimony, especially upon the statement of the juror himself, upon his *voir dire*. It seems he may be asked in our courts if he has not been convicted of an offense disqualifying him, without producing the record of conviction, and be compelled to answer.

(g) *Examination of juror by court, on motion of either party.*—By statute, (§§ 6000, 4927), also, the court is required, on motion of either party, to examine on oath any person called as a juror, to ascertain whether he is related to either party, or has any interest in the case, or has expressed or formed any opinion as to the guilt or innocence of the accused, or is sensible of any bias or prejudice against him, and the party objecting to the juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the case, he shall be excluded from the panel.

(h) *What the court may ask on its own motion.*—The court may, *ex mero motu*, without the suggestion of either party, examine upon their *voir dire* all persons summoned as jurors touching any disability created by statute, and may set aside a juror therefor, or for being disabled physically or mentally by disease, domestic affliction, or other cause, from properly performing the duties of a juror; but not so when there is no absolute want of capacity, but only want of fitness to serve in the particular case.

(i) *Effect of improperly overruling or sustaining challenge.*—Improperly to overrule a challenge of the accused is error for which the judgment must be reversed, and the error is not cured because the accused excluded the juror from the panel by challenging him peremptorily, nor because he is excluded therefrom by the lot.

Improperly sustaining a Commonwealth's challenge is said to be error for which judgment must be reversed; and not withstanding the doubt which Mr. Minor entertains as to the correctness of this position, it is a proposition founded, it would seem, in the abundant tenderness which the common law always extends to an accused and the jealousy of that and of our constitutional law of an invasion of his right of challenge and trial by an impartial jury, and in that view can be justified; for were the law otherwise, the court, at the in-

stance of the attorney for the Commonwealth, would possess an unlimited privilege of *quasi* peremptory challenge, whose decision would be final and not subject to review and reversal by an appellate court; and the accused might well complain that he is tried by a juror against whom, indeed, he can make no legal objection, but who, nevertheless, is much more objectionable to him than the one challenged and excluded at the instance of the Commonwealth.

(j) *When juror properly challenged, because opposed to capital punishment.*—See Code, § 4899. Where, upon a trial for a capital offense, a juror states he has conscientious scruples about the propriety of capital punishment, and is opposed to it; and being asked by the Commonwealth's attorney whether, if the testimony proved the prisoner guilty of murder in the first degree, he would convict him of it, replies, "I do not know," he is properly challenged for cause by the attorney and set aside by the court. (H's G. & M., pp. 606-10.)

(7) *How panel selected and jury constituted.*—See Code, § 4900.

(a) *How jury selected by lot.*—After the panel is complete, if the accused or the Commonwealth does not strike off any, or strikes off less than four, the jury may be constituted either by drawing out the twelve, or else by drawing out and discharging all but twelve.

(b) *Oath of the jury.*—The jurors are usually sworn by fours, as follows: "You shall well and truly try, and true deliverance make between the Commonwealth and C. D., the prisoner at the bar, whom you shall have in charge, and a true verdict render: so help you God?"

It is sufficient if the record recites that the "jury were sworn the truth of and upon the premises to speak."

(c) *Charge to the jury by the clerk.*—In felony cases the clerk charges the jury. The object of the charge is to acquaint them with the contents of the indictment, which is read to them—the prisoner meanwhile standing up—and to explain to them whether they are merely to declare him guilty or not guilty, or to do that and also to fix the punishment, acquainting them with the extremes thereof. If the clerk err in his charge in such a manner as to prejudice the accused the verdict must be set aside and a new trial awarded for the charge is regarded as the act of the court, being made

by its officer in its presence. In misdemeanor cases, the cause is opened by counsel as in civil cases. And now, by statute, in any case, felony or misdemeanor, counsel on either side may make an opening statement of his case to the jury (Code, § 4905).

(d) *Instructions of court; argument of counsel.*—It is the right and duty of the court when, in its opinion, the occasion requires, although neither party request it, to charge or instruct the jury upon the law of the case, as applicable to the facts in proof; but this is seldom done, except at the instance of the prosecution or the defense. The accused is entitled to a full and correct statement by the court of the law applicable to the evidence in his case, and any misdirection by the court in point of law, on matters material to the issue, is a ground for a new trial. The courts will not usually allow counsel to argue against its instructions. As to the argument, if the plea be not guilty, the prosecution opens, the defense replies, and the former concludes; but upon demurrer, plea in abatement or in bar, or in other case where the accused has the affirmative of the issue, the defense opens and concludes. (H's G. & M., pp. 610-11.)

(8) *When and how jurors summoned from another county or corporation.*—See Code, § 4901.

The necessity for resorting to another county or corporation for jurors, is a question to be submitted to the discretion of the court upon all the facts, and the court may properly overrule such a motion made on the ground of local prejudice, until an effort to obtain an impartial jury has failed. They may be summoned under an order of the court to that effect, or under a *venire facias* issued by its direction; and any number may be summoned from one or more counties or corporations. (H's G. & M., p. 611.) It must be made to appear in some manner that it is reasonably necessary to send to another county or city (107 Va. 881); but the trial court has a wide discretion in this regard (115 Va. 921). For change of *venire* see (10), below.

(9) *When jury not kept together; when kept together; their board.*—See Code, § 4902, as amended by Acts 1922.

(a) *When jury must be kept together.*—Prior to this statute jurors were kept together in Virginia during the trial of all felony cases; but the statute limits the requirement to

felonies punishable by death or confinement in the penitentiary ten years. In other felonies, and in all misdemeanors, the jury are treated as in civil cases, and remain in court; or, if deliberating on their verdict, in the jury-room, and upon the daily adjournment the court, in its discretion, may allow them to disperse for the night, but with a special charge not to converse with any one touching the subject of the trial; and for misconduct their verdict may be set aside.

(b) *What separation or conduct vitiates verdict.*—If the trial be not concluded in one day, the jury are to be kept together, apart from all other persons and in the custody of the sheriff, who should be sworn (though this is not indispensable) neither to speak to them himself nor suffer any other person to speak to touching the trial. After any evidence is given, any separation out of the custody and control of the officer is *prima facie* sufficient to vitiate the verdict, and it is incumbent upon the prosecution to refute that presumption by disproving all probabilities or suspicions of tampering; and so, also, any communication whatever with other persons, save with the consent and in the presence of the officer or the judge, will be ground for a new trial; and upon a motion to set aside a verdict for such separation or conduct, the prisoner must prove the fact in court, and the mere offer to do so, which the court refuses, under the circumstances, is not sufficient for the appellate court to act on the question, but the exception should show the proof. (H's G. & M., p. 612.)

(c) *What record must show.*—It must affirmatively appear from the record that, in the prosecution of felonies enumerated in this section, the jury, when not in the presence of the court, were kept in custody of the sheriff or other proper officer (92 Va. 795, 803); but where the record shows that at the beginning of the trial of a criminal case all the officers in charge were duly sworn with the usual oath to keep the jury during the trial when absent from the court it is sufficient, and is unnecessary to show that such oath was administered upon each adjournment. (98 Va. 818.)

(10) *Change of venue.*—See Code, §§ 4914-16.

(a) *When application for change of venue to be claimed.*—The usual ground for changing the *venue* is the existence of general prejudice in the county or corporation where the case is pending, which will prevent a fair and impartial trial.

The affidavit of the accused of his fears and belief that such is the case, accompanied by newspaper clipping is not sufficient. He must show by independent and disinterested testimony such facts as makes it probable, at least, that his fears and belief are well founded. But a judicious exercise of the privilege of obtaining a jury from another county or corporation (see (8), above), in any criminal case, will greatly obviate the necessity of a change of *venire* for such cause; and, indeed, such a motion should usually precede a motion for a change of *venue*, and a failure to make such motion and an impartial jury being in fact obtained, the conclusive presumption is that the application for a change of *venire* was unfounded. (H's G. & M., p. 613; 103 Va. 816; 115 Va. 921.)

Where the ground is such prejudice and excitement against the accused as to endanger a fair trial, a motion for a jury from another county or city need not be first made (107 Va. 919).

(b) *Prisoner need not be arraigned or plead anew.*—A prisoner, who has been arraigned in the court from which the case is removed, and there pleaded "not guilty," which is entered on the record, need not be arraigned, nor shall he be required to plead in the court to which the *venue* is changed (H's G. & M., p. 614).

(c) *Judge may try or not, in his discretion.*—Whether a judge is so situated in respect to a case as to render it improper to try it, depends upon the self-consciousness of the judge himself, and an appellate court cannot revise his decision (8 L. 364).

(11) *As to insane persons.*—See *Insane, etc.*, sections 10 to 17.

(12) *Verdict and judgment.*—See Code, §§ 4918-25.

(a) *As to verdicts generally.*—The verdict of the jury must be unanimous, and delivered in court, and recorded, and then read to the jury and their assent obtained; and until then they have a right to retract or alter it. A verdict may be general, as when the jury find the accused not guilty, or guilty and fix the punishment, if the law does not do so; or it may be special, as when all the facts are found and set forth, and it is submitted to the judgment of the court whether the accused, upon that state of facts, is in law guilty or not guilty;

and it is competent for a jury to find a general or special verdict as they may think proper. (H's G. & M., p. 616.)

(b) *Conviction for part of offense charged; on new trial, for what trial to be.*—See Code, §§ 4918, 4920-22.

The general rule of the ancient common law was to allow several felonies or several misdemeanors to be charged in several counts in one indictment, but not to allow the joinder of a felony with a misdemeanor; and upon a charge of a felony there could be no conviction for a constituent misdemeanor. But by the statute in Virginia, and by judicial construction in many jurisdictions, the common law doctrine has been extended only so far as to allow a conviction for a misdemeanor as well as for a felony, where the misdemeanor is included in the felony and proved by the same evidence relied on to establish the felony; as, assault and battery, under an indictment for robbery, or malicious maiming, or other unlawful maiming (it being a felony—91 Va. 791); and a conviction on one count or of one offense operates as an acquittal on the other counts and of all other offenses in the indictment, and judgment should be entered accordingly. By the revision of 1887, the then existing law in respect to the second trial when a new trial is granted, was changed to read as follows: "If the verdict be set aside and a new trial granted the accused, he shall not be tried for any higher offense than that of which he was convicted on the last trial." (H's G. & M., p. 615.)

(c) *As to "higher" offense.*—As a general rule the maximum of punishment determines whether offenses are of higher or lower or equal degree. Housebreaking in the night time with intent to commit larceny, and grand larceny are of equal degree. First degree murder is higher than the second degree. (91 Va. 792.) A conviction of an attempt under an indictment for rape, bars re-trial for rape. (111 Va. 837.)

(d) *Conviction of petit larceny, under indictment for grand larceny.*—See Code, § 4043.

It is not indispensable that the jury should in terms find the value of the thing stolen. If they find the accused guilty of petit larceny (or grand larceny?) the verdict will be sufficient. (H's G. & M., p. 616.)

(e) *Conviction of attempt, under indictment for felony; effect of general acquittal.*—See Code, § 4922.

This section changes the rule at common law. On an in-

dictment for felony under this section, if it be proved that the accused intended to commit the felony, and did some act toward its commission, yet not committing it, the jury should convict him of an attempt to commit such felony; but if it be proved that he committed some act therein stated, as a part of the felony therein charged, which act is in itself a criminal offense, and he did not commit the felony, nor intend to commit it, he should be convicted of such offense under (b), above, whether it be a substantive misdemeanor or a mere attempt thereat. An acquittal on an indictment for felony or misdemeanor is a bar to any subsequent indictment for any and every offense for which he could be convicted under the first indictment. (H's G. & M., pp. 616-17.)

(13) *Judgment on general verdict of guilty if any count good.*—See Code, § 4923.

(a) *Construction of this section.*—This section affirms the common law, but makes that rule applicable to all criminal cases, and protects the accused from injury by giving him the right to have any faulty count excluded from the consideration of the jury, either by way of an instruction from the court to that effect, or, what is the same thing, by a motion to exclude evidence which could only be applicable to such counts; and if the court should err in either respect to the prejudice of the accused, the error may be redressed by appeal.

(b) *As to joinder of counts and offenses.*—It is frequently advisable, when the crime is of a complicated nature, or it is uncertain what the evidence may discover, to insert two or more counts in the indictment; a practice that is the more necessary because, though the petit jury may find him guilty of a part and acquit him of the residue, the grand jury, while they may find some whole count and reject the rest, cannot separate the parts of a count, but must either find a true bill or throw out the whole. And this course is as legal as it is advantageous; for it is even no objection, either upon demurrer or arrest of judgment, that separate offenses of the same nature are joined against the same defendant. And the only mode of objecting to a joinder of such offenses in case of felony, is a motion to quash, or to compel the prosecutor to elect on which charge he will proceed, which motion the court should grant if the charges grew out of different transactions, or are not only distinct but may confound the prisoner,

or distract the attention of the jury. But if the charges are merely distinct, without such prejudice, or relate to the same transaction, and describe it in different and even inconsistent ways, so as to meet the evidence as it may transpire, the motion should be denied. And in misdemeanor cases even greater freedom is allowed, for the court will not quash or compel election, even though several separate and distinct misdemeanors, arising out of different transactions, be joined against a single defendant; yet, if against several defendants, the court should quash the indictment.

(c) *Preparing to hear judgment.*—In felony cases the accused, being always necessarily present, is asked if he has anything to say why judgment should not be pronounced against him, and if nothing effectual is said in delay or arrest of judgment sentence is given accordingly. In misdemeanor cases there are no preliminaries, and judgment may be entered whether accused is present or not. See section 13, (3), (a) and (b), above.

(d) *Motion in arrest of judgment.*—See section 11, (10), above. (H's G. & M., pp. 617-18.)

(e) *Second and third convictions of felony.*—See Code, §§ 4785-8, 5054.

The indictment must set out the time and place of the first conviction (which must, it seems, be final), and that the conviction was for an offense committed prior to the commission of the second or third offense for which the accused is on trial. (H's G. & M., p. 618.)

§ 14. Criminal proceedings generally.—See Code, §§ 4967-86.

§ 15. Motion for new trial.—

(1) *As to subject of new trials generally.*—A motion for a new trial is governed by the same rules in criminal as in civil cases. The motion should be made before judgment; but any time during the term, even after judgment, is not too late, for the court may set the judgment aside.

The motion is an appeal to the sound discretion of the court to prevent a gross, palpable, and material wrong, and should be denied if substantial legal justice has been done, even though irregularities have occurred, or the wrong, however palpable, is trivial in extent. The practice of granting new trials in civil cases sprang up during the seventeenth cen-

tury, and in cases of treason and felony it has never been the practice in England to grant new trials, notwithstanding Lord Mansfield said he would do so in a proper case, but when the judge is dissatisfied execution is respited and the crown grants a pardon. But in Virginia the practice of granting new trials has long prevailed, but has never received, in criminal cases, the authoritative sanction of the supreme court until 1837, in Ball's case. A motion therefor is not admissible on the part of the Commonwealth, unless perhaps where the verdict is obtained by fraud of the accused. A new trial may be granted as to one and denied as to others jointly tried with him. The grounds for a new trial, which are always extrinsic to the record, are: (1) Verdict contrary to the evidence; (2) after-discovered evidence; (3) accident, surprise, or fraud of prosecutor; (4) misconduct of jurors or officers in charge; and (5) misconduct or misdirection of the judge—all of which will now be treated in regular order.

(2) *New trial for verdict being contrary to evidence.*—A new trial should not be granted merely because the judge, if on the jury, would have given a different verdict, or even hung the jury, for that would be to usurp the province of the jury. The court should merely supervise, and not review the verdict, to prevent a clear and palpable injustice. Therefore, in doubtful cases the verdict should stand.

(3) *New trial on ground of after-discovered evidence.*—A new trial is granted on this ground with great reluctance and only under very special circumstances. Thus: The new evidence must not only have been unknown, but by reasonable diligence could not have been known, by the accused at the former trial. This is usually shown by the affidavit of the party, which must be credited unless the contrary appears. And the substance of the new evidence must likewise be sworn to by the witnesses themselves, or by some one who has heard their statements; for it must appear that the evidence is material and such as ought to produce a different verdict on a new trial, and not merely cumulative, corroborative, or collateral testimony, or such as merely tends to discredit an adverse witness.

(4) *New trial for accident, surprise, or fraud of prosecutor.*—Accident and surprise are grounds for a new trial where there is no neglect or default in accused or his counsel,

as where defendant is prevented by detention of the train from attending trial, or the like.

So, likewise, fraud or misconduct on part of prosecutor, as tricking the accused out of his evidence, or the like, is ground for a new trial.

(5) *New trial for misconduct of jurors or officers in charge.*—As a general rule the testimony of jurors is inadmissible to impeach their verdict, especially on the ground of their own misconduct. (Code, §§ 6013-14, 4927.)

(a) *Separation of jury before verdict.*—See section 13, (9), above.

(b) *Previous expression of opinion by juror of prisoner's guilt.*—If the opinion were casual and hypothetical, and not deliberate and decided, nor indicative of malice, it is not cause for a new trial. See section 13, (6), (d), above.

(c) *Jurors casting lots to determine their verdict.*—Casting lots is such misconduct as is ground for a new trial; so is the agreeing beforehand to the result of setting down each the number of years of confinement he favors and dividing the aggregate by twelve. But obtaining such a result as an experiment towards a compromise of conflicting opinions, and agreeing to it afterwards, is not misconduct.

(d) *Partaking of refreshments.*—If furnished by a party, or partaken to excess, especially spirituous liquors, the verdict must be set aside; but not so if taken without ill design in moderation.

(e) *Jurors reading newspapers.*—Allowing jurors to read the newspapers, pending their deliberations, is highly improper; but it does not invalidate the verdict if there be nothing therein calculated to influence, or which did influence, the decision.

(f) *New trial for misconduct or misdirection of the judge.*—Thus, a new trial will be granted for improper admission or exclusion of jurors; comments on the weight or sufficiency of the evidence; improper charge by the clerk, which is regarded as the act of the court; and, in general, any improper ruling to the prejudice of the accused. See section 13, (7), (c) and (d). (H's G. & M., pp. 624-6.)

§ 16. **Writ of error or appeal.**—See *Appeals*.

§ 17. **Execution of judgment.**—See Code, §§ 4940-8.

§ 18. Discharge from jail.—See *Fines*.

§ 19. Pardon.—See *Pardon*.

§ 20. General forms of indictment, presentment and information.

NO. 1. GENERAL FORM OF AN INDICTMENT

(Code, §§ 4844-5; Va. Const., sec. 100, H's G. & M., pp. 537, 541-2, 617.)

Virginia, ——— county, to-wit: In the circuit court of said county:

1st count. The jurors of the Commonwealth of Virginia, and in for the body of the county of ———, and now attending the said Court at its ——— term, 192—, upon their oaths present, that C. D., on the ——— day of ———, in the year 192—, in said county [here insert "description" of the offense], against the peace and dignity of the Commonwealth of Virginia.

2d count. And the jurors aforesaid, upon their oaths aforesaid, do further present, that C. D., on the ——— day of ———, in the year 192—, in said county [here insert "description of the offense"], against the peace and dignity of the Commonwealth of Virginia.

Witnesses sworn and sent by the court to the grand jury to give evidence, July ———, 192—.

R. D., Clerk.

If there be an accessory before the fact, just after the description of the offense and before the conclusion "against the peace," &c., insert this: "And the jurors aforesaid, upon their oaths aforesaid, do further present, that G. H., before the said felony and murder (or *burglary*, *robbery*, *rape*, *arson*, *larceny*, or other felony) was committed in form aforesaid, to-wit: on the said ——— day of ———, 192—, in the county aforesaid, did feloniously counsel, hire, procure, aid; and abet the said C. D. to do and commit the said felony and murder (or *burglary*, *robbery*, *rape*, *arson*, *larceny* or other felony) in manner and form aforesaid."

If there be an accessory after the fact, just after the description of the offense, and before the conclusion "against the peace," &c., insert this: "And the jurors aforesaid, upon their oaths aforesaid, do further present, that G. H., well knowing the said C. D. to have done and committed the said felony and murder (or *burglary*, *robbery*, *rape*, *arson*, *larceny*, or other felony) in form aforesaid, afterwards, to-wit: on the ——— day of ———, 192—, him the said C. D. did then and there unlawfully receive, harbor and maintain (or did other acts of relief, comfort and assistance, as the case may be)."

Principals in second degree may be indicted as principals. without distinction. (Code, § 4764.)

NO. 2. GENERAL FORM OF A PRESENTMENT

(*Idem.*)

We, the grand jury, on our oaths present, that C. D., on the ——— day of ———, 192—, in ——— county [here describe the offense, taking care that all the requisites of the offense are stated], against the peace and dignity of the Commonwealth of Virginia.

No. 3. GENERAL FORM OF AN INFORMATION

(Idem; H.'s G. & M., p. 538.)

Virginia, ——— county; to-wit: In the circuit court of said county:

Be it remembered that S. N., attorney for the Commonwealth of and for said county, who prosecutes for the Commonwealth of Virginia in this behalf, in his own proper person comes into the said court, on this ——— day of ———, 192—, and here gives the said court to understand and be informed that C. D., on the ——— day of ———, in the year 192—, in said county [here insert "description" of the offense], against the peace and dignity of the Commonwealth of Virginia.

CURTESY

- § 1. Definition
- § 2. Requisites for curtesy
 - (1) Valid marriage
 - (2) Seized or possessed
 - (3) Estate of inheritance
 - (4) As to a child born alive during marriage
 - (5) Death of the wife
- § 3. Curtesy, etc. barred by husband's desertion
- § 4. How curtesy released where husband minor or insane
- § 5. Insurance money in case of fire

§ 1. **Definition.**—Curtesy is an estate for life which a husband has in his wife's lands upon her death, but at common law only where a child was born during their marriage, though otherwise now by recent statute. By Acts 1922: "A surviving husband shall, if the wife die testate (i. e., having made a will), be entitled to curtesy in one-third, and if she die intestate (i. e., without a will) and without issue of this or of a former marriage, in all of the real estate, (except her equitable separate estate where the instrument creating the same otherwise provides) whereof his wife, or any other to her use, was at any time during the coverture seized of an estate of inheritance, unless his right to curtesy shall have been lawfully barred or relinquished, and the fact that the husband conveyed or caused the real estate to be conveyed to the wife shall not bar his curtesy therein, nor shall it be a necessary requisite to curtesy that the wife shall have had a child born alive during coverture."

This act does not deprive a husband of his common law curtesy or life estate in one-third, where there is no will and a child born.

§ 2. Requisites for curtesy.—By section 5134 of the Code, “her husband shall be entitled to curtesy in her real estate other than her equitable separate estate (see (3), below), when the common requisites therefor exist, and he shall not be deprived thereof by her sole act.” (See, also, *Married Woman's Property and Other Rights*, section 1.)

The requisites for curtesy are:

(1) *Valid marriage.*—If it is absolutely void, or annulled for a voidable cause (see *Marriage*, sections 2 and 3), or if there is an absolute divorce (see *Divorce*, section 3), there is no curtesy; but otherwise as to mere divorce from bed and board, yet where a decree of perpetual separation is added, there is no curtesy in after-acquired property, but there is in property acquired before such decree. (Code, § 5112.)

(2) *Seized or possessed.*—She may be seized or possessed by grant, deed, or will; but if she has only a right of entry upon or of action for land in the adverse possession of another continuing to her death, there is no curtesy. Ownership any time during marriage is sufficient, unless it has been lawfully relinquished.

(3) *Estate of inheritance.*—She must have had an estate that could be inherited by heirs—not, therefore, a mere estate for some one's life or for years—see *Real Estate*, section 2. But there is no curtesy in estate which he has conveyed or caused to be conveyed to her, unless he has expressly reserved therein that right (102 Va. 887; 96 Va. 749).

Curtesy may also be had in her equitable estates (Code, §§ 5117, 5158), not only her equitable separate estate, unless forbidden by the instrument, (see *Married Woman's Property and Other Rights*, section 9), but also in money converted into land by equitable construction or statutory enactment (see *Real Estate* section 1, (1)), and in her equities of redemption. Where the wife executes a mortgage or deed of trust before marriage, and it is not foreclosed in his wife's lifetime, the husband has curtesy in the equity of redemption (or what remains after satisfying the trust); but if the mortgage, etc., is foreclosed during her lifetime, whether made before or after marriage, the surplus proceeds is only personalty.

Curtesy may be had in the estate of inheritance of a joint tenant, tenant in common or co-parceners.

(4) *As to a child born alive during marriage.*—If the mother die in childbirth, and the child is afterward taken from her alive, there is no curtesy. But see the present statute—section 1, above.

(5) *Death of the wife.*—Immediately upon her death, he takes (without an assignment) by mere operation of law. (1 M's Real Prop., §§ 232, 236, 239, 242, 245, 281, 941.)

Civil death, as, being sentenced to the penitentiary, is not sufficient; but seven years' absence from the State, unless it is made to appear that he was alive within that time, is sufficient, and 20 years' absence unheard of, is conclusive proof of one's death. (Code, § 6239, as amended by Acts 1920, p. 421.)

§ 3. *Curtesy, etc., barred by husband's desertion.*—See *Descents and Distributions*, section 13.

§ 4. *How curtesy released where husband minor or insane.*—By court proceeding, his right being secured (Code, § 5346).

§ 5. *Insurance money in case of fire.*—The husband is entitled to its use or income for life. (10 Leigh, 356; 1 M's Real Prop., § 216.)

DEAF, DUMB AND BLIND SCHOOL

For such school for white pupils, see Code, §§ 970-78; for colored pupils, §§ 979-85. For general provisions as to colleges, etc., see Code, §§ 986-1003. For act creating the Virginia Commission for the Blind, see Acts 1922, p. —.

DEATH BY WRONGFUL ACT, ETC.

- § 1. The statute
- § 2. Construction of statute
 - (1) When no action for death
 - (2) Death pending suit
 - (3) Measure of damages

The common law did not allow an action for damages for

the "death of a man." At common law the master or employer, the husband, or the parent could recover for an injury to the servant or employee, the wife, or the child, by a third person's wrongful act, neglect or default, where there was a loss of service (but not for any service after death up to 21); and where the party died there was no action, according to the maxim "a personal action dies with the person." Hence, the statute.

§ 1. The statute.—Section 5786 of the Code provides: "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed *in rem* against said ship or vessel, or *in personam* against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel *in rem*, and her owners to a libel *in personam*, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Section 5787 (as amended by Acts 1920, p. 26) and section 5788, provides that an action may be brought by an administrator, or executor, within one year (which must be stated in the declaration), and the damages may be such as to the jury "may seem fair and just, not exceeding \$10,000," which are distributed by the jury and the court, after payment of costs and reasonable attorney's fees (but not debts or liabilities of the deceased) to the widow or husband and children and grandchildren; or if no child or grandchild, but a widowed mother and widow, the amount is divided between those two as the jury or court may direct; if, however, there is no child or grandchild or widowed mother, then the amount goes to the parents, brothers and sisters; but if none of the above persons, then the damages shall pass according to the statute of distributions (Code, 5273). But nothing is apportioned to the deferred class until the preferred class has been exhausted, yet between members of the same class the jury has absolute discretion as to who shall receive the whole or any part of the

recovery. By sections 5789 and 5790 of the Code (as amended by Acts 1920, p. 26), the administrator or executor, with the consent of the parties entitled to such damages, may compromise any claim for the same. If any of the persons are under age or other disability, the compromise may be made with the approval of the judge, in term or vacation, who directs the distribution in case the parties cannot agree, or are under disability.

(2) *Construction of statute.*—The only effect of the statute is to change the rule of the common law which allowed no action in favor of heirs, distributees, or an administrator or executor of a deceased person for damages for his wrongful death; the single change being that the right of action is given by it solely to the administrator or executor for the benefit of the parties named; and under the statute, the damages are not limited to pecuniary loss. (Graves' Notes on Torts, 18.)

(1) *When no action for death.*—Section 5786, above, says a recovery may be had where "the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action," and "to recover damages in respect thereof." So a recovery cannot be had (a) where the deceased was guilty of contributory negligence; (b) nor where the father, mother, or other beneficiary of a child who is killed (he not being capable of contributory negligence) is guilty of contributory negligence proximately contributory to the injury causing his death; (c) where the deceased in his lifetime has, as section 5787 (as amended by Acts 1920, p. 26) says, compromised for such injury and accepted satisfaction therefor. (Graves' Notes on Torts, 19-20.)

(2) *Death pending suit.*—Section 5790 of the Code (as amended by Acts 1920, p. 26) says, "where an action is brought by a person injured for damages caused by the wrongful act, neglect, or default of any person or corporation, and the person injured dies pending action," the action may be revived in the name of his administrator or executor. Our court of appeals says (980, 548), the object of the section is to allow a revival of the action without regard to the cause of death. The recovery, where the death was from some other cause, would of course not be under the statute, and the damages would not be limited to \$10,000, and would be assets of the deceased's estate and liable for his debts, and goes according

to the statute of distributions; but if the plaintiff dies from the injury received, the revived action is held (107 Va. 206) to be, not the common law, but the statutory action, which is a new and distinct action. (Graves' Notes on Torts, 22-24.)

(3) *Measure of damages.*—The languages of the statute, "such damages as to the jury may seem fair and just, not exceeding \$10,000," does not limit them to the mere pecuniary loss and injury to the beneficiaries. In ascertaining the damages, the jury may consider:

(1) The pecuniary loss, fixing an amount equal to the probable earnings of the deceased, considering his age, business capacity, experience, and health, during this probable lifetime had he not been killed; (2) compensation for the loss of his care, attention, and society; (3) such further sum as the jury may deem fair and just by way of solace and comfort, for sorrow, suffering, and mental anguish occasioned by his death, but perhaps not for the mental and physical anguish of the deceased. (Graves' Notes on Torts, 24-25.)

§ 3. Death or injury of employee by wrongful act or neglect of railroad company.— See *Employer and Employee*, div. I, section 4.

DEATH (PRESUMPTION OF)

By the common law and by statute, death is presumed where a resident leaves and does not return to the State for seven years successively, unless proof be made that he was alive within that time. (Code, § 6239.)

For similar statute as to letters of administration, see Code, §§ 5361-8.

DEDICATION

See *Cities and Towns*, div. IV., §§ 3 and 4.

§ 1. Definition

§ 2. How dedication made; intention

§ 3. Acceptance of the dedication

§ 4. Abandonment of the use

§ 1. **Definition.**—A dedication is an appropriation of land by the owner to some public use, which is accepted for such use by or on behalf of the public, as, for a public road, street, alley, park, square, cemetery, school, or monument. For dedication for religious, charitable and educational purposes, see *Trusts and Trustees*, section 16.

§ 2. **How dedication made; intention.**—A dedication be made by deed or will or contract, or without either, and may be subject to conditions, reservations, or restrictions upon its use by the public, as, a road to be used at a particular season, or for a certain purpose only, or for use by pedestrians alone, or by a certain class of vehicles.

No form or ceremony is required, and the statutes as to conveyances and agreements in writing (Code, §§ 5141, 5561) not applying, no deed or writing is necessary, unless where specially required. It is sufficient if it be clear and certain that the person intends to dedicate. More acquiescence in a public use of the land is not by itself sufficient; but such use, if long and continued, taken in connection with circumstances, may raise a presumption of such intention (107 Va. 86; 106 Va. 794, 797; 95 Va. 660; 93 Va. 200, 204).

Sections 5217-22 of the Code provides that if land, is divided into city, town, or suburban lots to be sold, with streets and alleys indicated, thereon and the maps and plats acknowledged and recorded, the streets and alleys are thereby dedicated to the public, and as to such portion as is therein dedicated to charitable, religious, or educational purposes, the recordation of the maps and plats is declared equivalent to a deed in fee-simple; but reserving to the owner, among other things, the right to vacate such plat and the dedications and donations growing out of it, at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated, duly executed, acknowledged or proved and recorded in the same office. And where some of the lots have been sold, the plat may be vacated in the same way by the joinder of all the owners of lots in the execution of such writing. (2 M's Real Prop., §§ 1353-4.),

§ 3. **Acceptance of the dedication.**—Until acceptance by

the public, the dedication is in the nature of a mere offer or license by the owner which he may withdraw at any time (104 Va. 599; 101 Va. 338; 95 Va. 660); and which will impose no responsibility for maintenance and repairs upon the public authorities (102 Va. 165). No acceptance is required of the streets and alleys of city, town, and suburban lots mentioned in section 2, above.

The acceptance by the State or city or town authorities may be informal or implied, as well as formal and express, as when the authorities in charge of such matters, without express acceptance, made repairs and improvements (102 Va. 165), though it is otherwise as to county roads which must be formally accepted by the court and the acceptance entered of record (107 Va. 86; 104 Va. 603; 95 Va. 660; 8 Grat. 632). Indeed, after an offer of dedication acceptance may be presumed by the jury from mere use by the public, though the authorities take no notice of the offer (102 Va. 165). (2 M's Real Prop., § 1335.)

§ 4. Abandonment of the use.—In case the use for which the land is dedicated and accepted, is abandoned or becomes impossible, the land reverts to the original dedicator or those claiming under him. (2 M's Real Prop., § 1355.)

DEED OF TRUST

See *Assignment for Benefit of Creditors; Chattel Mortgage; Fraudulent and Voluntary Conveyances; Mortgage; Recordation or Registry; Trusts and Trustees*

- § 1. Definition; distinguished from mortgage
- § 2. Duties of trustee
 - (1) Mode of sale
 - (2) Trustee to file account of sales with commissioner of accounts
- § 3. Trustee's compensation
- § 4. Where more than one trustee
- § 5. Substitution of trustees, in case of vacancy
- § 6. Deed of trust or mortgage secures the debt, howsoever evidenced
- § 7. Limitation of enforcement of deed of trust or mortgage
- § 8. Assignment or debt secure by deed of trust or mortgage

- § 9. Effect of conveyance of property to another
- § 10. Priorities as between deed of trust, mortgage, etc.
- § 11. Effect of foreign deed of trust, mortgage, etc.
- § 12. Fraudulent sale or removal of encumbered property
- § 13. Satisfaction a defense to ejectment—see Code, §§ 5472-3
- § 14. Deed of trust, mortgage, etc., on "poor law" exemption is void—see Code, § 6564
- § 15. Satisfaction and release of deed of trust, mortgage, etc.
- § 16. Recordation of deed of trust or mortgage
- § 17. Various forms under "Deed of Trust"

§ 1. Definition; distinguished from mortgage.—A deed of trust to secure a debt is a conveyance of real or personal property or both by a debtor, to a third person, called a trustee, in trust upon default in payment of the debt, to sell and pay the debt. For difference between a deed of trust and a mortgage, see Mortgage, section 1, and Chattel Mortgage, section 4.

§ 2. Duties of trustee.—The trustee is supposed to be impartial and disinterested, the common friend and agent of both parties, and as such he should act justly, impartially, and discreetly. But being a stockholder in a corporation does not disqualify him (Acts 1920, p. 502; Pocket Code 1920, § 5166-a.)

(1) *Mode of sale.*—The statute (§ 5167, as amended by Acts 1922) provides that the trustee, except so far as otherwise therein provided, shall, whenever required by any creditor secured, or any security indemnified, or his administrator or executor, upon default of payment of the debt or any part thereof, and after reasonable notice of the time and place of sale, sell the property, or so much as may be necessary, at public auction, for cash, and shall apply the proceeds, first to the expenses of executing the trust, including a commission to the trustee of 5 per cent. on the first \$300, and 2 per cent. on the residue of the proceeds, and then *pro rata* (or in the order of priority, if any, prescribed by the deed), to the payment of the debts secured and the indemnity of the sureties indemnified by the deed of the trust, and shall pay the surplus, if any, to the grantor, his heirs, administrator, executor, or assigns. Upon recordation of the trustee's deed, the clerk must note a reference thereto in the margin where the deed of trust is recorded.

The trustee, in selling, acts under a power and must conform to the terms of the deed of trust, as to the time and manner of giving notice and making the sale (which the deed of trust may prescribe), as well as in all other particulars. His position is one of personal confidence, and he must, therefore, act in person, and not by agent. But by section 6196 of the Code where the trustee's deed recites on its face that the sale has been regularly made in accordance with the terms of the deed of trust, such recitals shall be *prima facie* evidence that the sale by the trustee was regularly made and that the recitals contained in the trustee's deed are true.

If there be any impediments to the fair execution of the trust, such as a cloud upon the title, or uncertainty as to the amount to be raised or the existence of previous encumbrances, or conflicting liens, or the trustee's being or becoming interested in the debt secured, or where a reasonable price cannot be obtained, or where for any reason a present sale would likely sacrifice the property, or where no place of sale is named and the parties object to the place selected by the trustee, he should file a bill in equity, and if he fails to do so, the debtor may stay a sale by injunction against him until these objects can be effected.

The trustee's power is "coupled with an interest" (the legal title) and although he sells ever so much contrary to the terms of the deed of trust, or to his general duty, yet his conveyance passes the legal title and the purchase can be assailed only in a court of equity, where only a material departure, as, ignoring the plain mandates of deed of trust as to advertising, etc., will vitiate his proceedings. Such a sale will be set aside at the instance of the grantor, or a prior grantee from him who was ignorant of the time and place for sale.

As the trustee is authorized (§ 5167, as amended by Acts 1922) to pay any balance of the proceeds of sale "to the grantor, his heirs, personal representative or assigns," it would seem he may sell after the death of the debtor, and this is the practice.

In the distribution of the proceeds of sale, the trustee must follow the directions of the deed of trust; if none, then the statute above.

(2) *Trustee to file account of sales with commissioner of*

accounts.—A trustee must, within 4 months after the sale, return to the commissioner of accounts of the court wherein the deed was first recorded, an inventory of the property sold and an account of sale, under penalty of forfeiting his commissions thereon, unless the same be allowed by the court; if before sale, the land is taken within the limits of a city, his return and settlement must be before the commissioner of accounts there and he must also exhibit to him, within six months from the end of the year after the date of the trust, or any succeeding year, a statement, with vouchers, of all the money which he has received or became chargeable with, or has disbursed during the year, under penalty of forfeiture of his compensation for that year, and it is the commissioner's duty, upon the informal complaint of any one interested, to compel him to make such statement. (Code, §§ 5405, 5408-9.)

§ 3. Trustee's compensation.—The statute (§ 5167) says, "except where otherwise provided," his compensation shall be "5 per cent. on the first \$300, and 2 per cent. on the residue of the proceeds"; but more commonly the compensation is fixed at 5 per cent. straight, or at a large amount, in the deed of trust.

§ 4. Where more than one trustee.—Joint trustees have all equal power, interest, and authority, and cannot act separately, but must all join both in conveyance and receipts. (1 M's Real Prop., § 509.)

§ 5. Substitution of trustees, in case of vacancy.—See statute and proceeding under *Trusts and Trustees*, section 14.

§ 6. Deed of trust or mortgage secures the debt, howsoever evidenced.—A deed of trust or mortgage secures the debt, and not merely the note or bond or other evidence of it, and no change in the form of the evidence (even a judgment), or the mode or time of payment—nothing short of actual payment, or an actual release—will discharge the encumbrance: notwithstanding the encumbrance, the creditor may sue for the debt and proceed to its collection by other methods.

If the debtor sells and conveys the property, the purchasers is not liable, personally, unless expressly so agreed, to pay the debt, but only the property is liable (he having notice of the encumbrance, but the debtor is still personally liable; if, however, the purchasers expressly assumes payment of the

encumbrance, he is personally liable as principal and the original debtor as surety. (1 M's Real Prop., §§ 598, 647.)

§ 7. Limitation of enforcement of deed of trust or mortgage.—It is 20 years from the time the obligation last maturing thereby secured shall have become due and payable, with an additional year from the death of the lienholder; but this may be extended 20 years at a time by endorsement of the party in whom the title is at the time of record, or his attorney in fact or agent, attested by the clerk, in the margin of the deed book; but this does not apply to a mortgage or deed of trust executed by a corporation or an investment or loan of funds arising from the sale or other disposition of glebe (or church) lands. (Code, § 5827, as amended by Acts 1922.)

Though an action on the note, bond or other debt be barred, yet the mortgage or deed of trust to secure it, is not barred until 20 years; the debt and lien are not barred though the remedy by action is barred (86 Va. 892; 89 Va. 524). (1 M's Real Prop., 639.)

§ 8. Assignment of debt secured by deed of trust or mortgage.—An assignment of the debt carries with it the trust or mortgage, or *vice versa*; and changing the evidence of the debt (as, the renewal of negotiable notes), does not release the lien. A mere delivery of the note, bond, or other evidence of the debt, with intent to transfer it, if for consideration, constitutes an assignment, as well as a written assignment.

The assignee of a note, etc., not negotiable secured by deed of trust or mortgage, takes subject to all the equities (offset, etc.) which the debtor has or may acquire against the assignor before the debtor has notice of the assignment (see Code, § 5768); in other words, the assignee cannot be in a better condition than the assignor, in whose shoes he stands; and it makes no difference that the assignment was for value and without notice, nor that after the assignment the debtor acknowledged the debt to be just; but otherwise if by his assurance made beforehand he induced the assignee to acquire the debt. While offsets or other equities are not allowed against the assignee of a negotiable note, yet Prof. Raleigh C. Minor thinks they are allowable as against an assignee of the deed of trust or mortgage itself, which is not negotiable.

Where several bonds, notes, or other demands are secured by one deed of trust, mortgage, or other lien, and are assigned in succession to different persons, the assignees are to be satisfied in the direct order of the dates of their assignment (1 Rand. 466; 2 Grat. 44; 8 Grat. 533, 536; 25 Grat. 454).

An assignment or release of the debt to the debtor discharges the deed of trust or mortgage. (1 M's Real Prop., §§ 645-6.)

By statute (§ 6457), a payee, assignee, transferee, or endorsee of any debt (or any part thereof) secured on real estate by mortgage, deed of trust, vendor's or mechanic's lien, may give notice of the assignment and transfer, by causing a memorandum or statement of the assignment to be entered on the margin of the page of the book where such encumbrance is recorded, signed by the assignor, transferrer, or endorser, or his agent or attorney and attested by the clerk; and subsequent transfers thereof may likewise be entered in the same manner and with like effect.

§ 9. Effect of conveyance of property to another.—

A deed of trust or mortgage is void as to all purchasers not parties thereto (including also any one having a lien by contract) for valuable consideration without notice (actual or otherwise, but mere possession of land is not notice) and lien creditors, until and except from the time it is duly recorded and indexed. (Code, § 5194, as amended by Acts 1922). If the purchaser buys with notice of the encumbrance, he takes subject thereto; but he is not personally bound for the debt, unless he has expressly agreed to pay it or impliedly agreed to do so, as where he purchases at a reduced consideration because of the encumbrance, in which case, however, he is only surety to the original debtor.

Where the debtor conveys part of the encumbered property, the land retained should be first subjected; and if the purchaser pay the debt, the debtor should pay him to the extent of the value of land retained, provided there are covenants of title or warranty, etc., and he has not assumed payment of the debt,

If the debtor conveys several parts of the encumbered land with covenants of title or warranty in succession to different persons, the various tracts are to be subjected in the inverse order of their conveyance, beginning with any part of

the land retained, next the tract last sold, and so on; and this is true as to judgments (Code, § 6476) or any other lien. But where a purchaser has assumed payment of the debt, his tract would be first subjected. Where the creditor having notice (other than by recordation, he being considered not a creditor but a prior purchaser) of the successive conveyances, releases a parcel which is primarily responsible, he thereby releases those parcels which are secondarily liable in the order of their liabilities to an extent equal to the value of the parcel first released; and if the purchaser of the latter parcel has assumed payment of the whole lien, and he is thereafter released by the creditor or with his consent, the property secondarily liable is thereby released altogether.

If the creditor transfers the encumbered property to different persons by the same instrument, as, by will, or by different instruments at the same time or on the same day, there are no priorities among the holders of the land, and must discharge the encumbrance ratably; and if the creditor, with notice (other than by recordation) releases one of the tracts it would seem he thereby releases all the tracts to that extent.

As to law where encumbered property is in hands of a tenant for life, as in the case of dower or curtesy, see *Dower*, section 4. (2), and *Curtsey*, section 2, (3). (1 M's Real Prop., §§ 647-51.)

§ 10. Priorities as between deeds of trust, mortgage, etc.

—Aside from the registry laws, the general rule as to the order in which deeds of trust, mortgages, and other liens are to be paid is embraced in these two maxims of the courts of equity:

(1) As between equal equities (or rights in equity) the first in point of time prevails, so that if all the liens are merely equitable or statutory liens, and the equities are equal, they should be paid in the order of their creation; and (2) where the equities are equal, the law (i. e., the legal title) will prevail, so that if any one of the encumbrancers is or becomes possessed of (or perhaps, has the right to call for) the legal title, he occupies an important vantage ground from which he cannot be dislodged except by a superior equity, which superiority is not created merely by priority in time, but arises from the fact of notice of an equity at the time of acquiring the title, or fraud, deceit, or gross negligence, etc., by which

another is induced to acquire the equity. Therefore, one having an equity or lien is preferred even to one holding the legal title or other equity acquired with notice of the former equity, or if the creation of the former has been induced by the fraud or deceit of the other parties or by their agreement or consent. (1 M's Real Prop., §§ 653-60; 1 Va. Law Reg. 4, 254.)

Most of the equities are now covered by the registry laws and are required to be recorded and indexed as against purchasers of real or personal estate (which includes creditors secured by mortgage or deed of trust, who, in law, are purchasers) for value and without notice (actual, or otherwise, but mere possession of land is not notice), and lien creditors (as judgments attachments, *lis pendens* and general creditors), prior or subsequent with or without notice. (Code, § 5194, as amended by Acts 1922.) Likewise no attachment or *lis pendens* binds a subsequent *bona fide* purchaser of real or personal estate for valuable consideration and without actual notice thereof until it is docketed and indexed (Code, § 6469); and no judgment is a lien on real estate as against a subsequent purchaser thereof for value without notice, until it is docketed and indexed (Code, §§ 6471, 6464).

So that, by these statutes, a later transaction may be superior to one earlier by failure to record it (29 Grat. 338; 26 Grat. 73).

§ 11. Effect of foreign deed of trust, mortgage, etc.—

No foreign deed of trust, mortgage, or other encumbrance on personal property is valid upon said property removed into this State as to purchasers (which includes creditors secured by a deed of trust or mortgage, who in law are purchasers) for value and without notice, and creditors (i. e., lien creditors, as, executions, attachments, reservation lien, etc.), unless and until the same is recorded here where the property is. (Code, § 5197.)

§ 12. Fraudulent sale or removal of encumbered prop-

erty.—In the case of a deed of trust or mortgage or the reservation of the title or a lien, in case of personal property, and the property is left in the possession of the debtor, and he fraudently sells, pledges, pawns it, or fraudently removes it from the premises where it has been agreed it should remain

and refuses to disclose the location thereof, or otherwise disposes of the property without the written consent of the creditor or trustee, he is guilty of larceny (or stealing) thereof; and the refusal to disclose its location or to surrender it, is *prima facie* evidence of guilt; but if the encumbrance is not docketed or recorded, an innocent third person may purchase the property and take it free from the encumbrance. (Code, § 4455.)

§ 13. Satisfaction a defense to ejectment.—See Code, §§ 5472-3.

§ 14. Deed of trust, mortgage, etc. on "poor law," exemption is void.—See Code, § 6564.

§ 15. Satisfaction and release of deed of trust, mortgage, etc.—By statute (§ 6456), when a debt is secured by "mortgage, deed of trust, vendor's or mechanic's lien," is paid or satisfied, the creditor, unless he has delivered a proper release deed, must cause such payment or satisfaction to be entered on the margin of the page of the book where such incumbrance is recorded; and for any failure to do so, after 5 days' notice, if the note, bond, or other evidence of debt be left with the lien creditor or the clerk, until the lien is released, the creditor forfeits \$20. Such entry must be signed by the creditor, his agent, attorney, or attorney in fact, and the note, bond, or other evidence of debt, duly canceled, must be produced before the clerk in whose office the lien is recorded, or an affidavit filed with him by the creditor, his agent, attorney, or attorney in fact, to the effect that the debt has been paid and the note, bond, etc., canceled and delivered to the person by whom it was paid, or has been lost or destroyed and cannot be produced. The entry, when so signed and the signature thereto attested by the clerk, with a certificate as to the above circumstances, operates as a release of the lien as fully and effectually as if said marginal entry were a formal deed of release duly executed and recorded, and if the lien be by deed of trust or mortgage, as if a re-conveyance of the legal title. The statute further provides that one owning or having an interest in property on which such lien exists may, after 20 days' notice to the lien creditor, apply to the court in which the lien is recorded to have the same released, and upon proof that it has been paid or discharged, or it appearing that more than 20 years have elapsed since its maturity, raising a presumption of payment not rebutted at the hearing, the court

orders the release to be entered on the margin by the clerk, which operates as a release of the lien. The clerk's fee, for the release, is 50 cents to be paid by the one applying for the release, unless otherwise provided in the encumbrance. All releases theretofore made upon presumption of payment are validated. A release or re-conveyance may be made to original grantor, though dead, and former releases, etc., of the kind, are validated.

§ 16. Recordation of deed of trust or mortgage.—As between the parties, they need not be recorded, but they must be as against lien creditors and all purchasers not parties thereto—see section 9, above and *Recordation or Registry*, for this and fees, etc.

§ 17. Various forms under "Deed of Trust."

No. 1. STATUTORY FORM OF DEED OF TRUST
(Code, § 5166.)

This deed, made the _____ day of _____, in the year 192—, between D. D. (the grantor), of the one part, and T. T. (the trustee) of the other part, witnesseth: that the said D. D. doth grant unto the said T. T., the following property [here describe it]: In trust to secure [here describe the debts to be secured or the securities to be indemnified, and insert covenants or any other provisions the parties may have agreed on]. Witness the following signatures and seals.

D. D. [L. s.]

T. T. [L. s.]

It is well for the trustee to sign to show that he accepts the trust; the party secured or indemnified should also sign, when he covenants or agrees to do anything.

No. 2. A MORE COMPREHENSIVE FORM
(Tate's Forms, 177; 4 Min. Inst. 1605.)

This indenture, made this _____ day of _____, in the year of our Lord 192—, between D. D., of _____, of the one part, T. T., of _____, of the second part, and C. C., of _____, of the third part: Whereas the said D. D. is justly indebted to the said C. C. in the sum of _____ dollars in gold, with interest thereon after the rate of _____ per centum per annum, from the _____ day of _____, in the year 192—, until paid, as appears by the bond of the said D. D., bearing date the _____ day of _____, in the year 192—, and payable on the _____ day of _____, in the year 192—, which said debt, with interest as aforesaid, the said D. D., binds himself and his heirs to pay when due, and is now desirous more effectually to secure: Now, therefore, this indenture witnesseth, that the said D. D., for and in consideration of the premises, and of one dollar to him in hand paid by the said T. T., at and before the sealing and delivery of these presents, the

receipt whereof is hereby acknowledged, doth grant, bargain, sell, aliene, release and confirm unto the said T. T., his heirs and assigns forever, all that certain tract or parcel of land situated and lying in ———, it being the same tract which was conveyed to the said D. D. by W. J., by deed bearing date on the ——— day of ———, in the year 192—, and of record in the clerk's office of the ——— court of the ——— of ———, as, reference thereunto being had, will more fully and at large appear, which said tract or parcel of land is bounded as follows, to-wit: Beginning at (describe the boundaries), together with all the appurtenances to the said land belonging, or in any wise appertaining. To have and to hold the said tract or parcel of land, with its appurtenances, unto the said T. T., and his heirs and assigns forever. And the said D. D., for himself and his heirs, doth covenant and agree with the said T. T., his heirs and assigns, in manner and form following, to-wit: That the said D. D., and his heirs and assigns, the title to said tract or parcel of land, with all its appurtenances aforesaid, unto the said T. T., his heirs or assigns, against the claims of all persons whatsoever, will warrant and defend forever. IN TRUST, nevertheless, and for the use, interest and purposes following, and none other, namely: that the said D. D. shall be suffered to remain in quiet and peaceful possession and enjoyment of the said premises, and their appurtenances aforesaid, until default be made in the payment of the debt aforesaid, with its interest aforesaid, or of some part thereof; and when the said D. D., his heirs or assigns, shall make default in the payment of the said debt, with interest as aforesaid, or of any part thereof, then upon this further trust, that as soon after such default as the said C. C., or his assigns, shall request, or the said T. T., or his heirs or assigns, shall think fit, the said T. T., or his heirs or assigns, shall proceed, at such time and place as he or they shall think best, to sell the said tract or parcel of land, with its appurtenances, or so much thereof as it may be necessary to sell, at public auction, to the highest bidder, for cash, having first given ——— days' notice of the time and place of the sale in one or more of the newspapers printed in ———; and out of the proceeds of such sale shall pay first, all costs and charges attending the execution of this trust; secondly, shall pay to the said C. C., or his assigns, the sum of ——— dollars, in gold, with all the interest that shall have accrued thereon as aforesaid, or so much of said debt and interest as shall then remain unpaid; and the balance, if any, shall pay to the said D. D., his heirs and assigns.* And if the said D. D., or his heirs and assigns, shall well and truly pay, in gold, the said debt, with interest thereon as aforesaid, and make no default therein, then this deed shall be void, or else shall remain in full force and virtue.

Witness the hands and seals of the parties the day and year first above written.

D. D. (SEAL.)

D. D. (SEAL.)

T. T. (SEAL.)

If a clause as to insurance is desired, insert the following after

the star: "And the said D. D. doth hereby covenant, and agree to have and keep, at his own proper cost and expense, during the continuance of this trust, the said property insured in some good solvent company, against loss by fire and lightning, in the sum of at least ——— dollars, the said insurance to be made payable, as the interests of the said C. C. may appear; and if the said D. D. shall default in taking out said insurance, or paying the premiums thereon, then the said C. C. may do so at the cost and expense of the the said D. D., and the amounts thus paid by C. C. shall be and constitute a part of the debt secured by this deed."

No. 3. DEED OF TRUST TO SECURE ENDORSERS IN BANK
(Tate's Forms, 181; 4 Min. Inst., p. 12605.)

This indenture, made this ——— day of ———, in the year of our Lord 192—, between D. D., of ———, of the first part, T. T.; of ——— of the second part, and C. C., of ———, of the third part. Whereas the said C. C. has endorsed for the accommodation of the said D. D., a certain note negotiable for the sum of ——— dollars, dated the ——— day of ———, 192—, and payable ——— months after date, at the ——— bank at ———, and now discounted at the said bank, and which said note it is contemplated to renew from time to time; and whereas the said D. D. is desirous to indemnify and secure the said C. C. against all loss by reason of his endorsement aforesaid. Now, this indenture witnesseth, that in consideration of the premises, and for the further consideration of one dollar by the said T. T. to the said D. D., in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said D. D. doth grant, bargain, sell and convey, release and confirm unto the said T. T., and his heirs, all that certain messuage and tenement (describe the premises, and state whence the title was derived by D. D.), together with all the appurtenances and privileges to the said messuage and tenement belonging, or in any wise appertaining. To have and to hold the said messuage and tenement with the appurtenances and privileges aforesaid, unto the said T. T., and his heirs forever. And the said D. D., for himself and his heirs, doth covenant and agree with the said T. T., and his heirs and assigns, that the said D. D., and his heirs, the title to the said messuage and tenement, with all the appurtenances and privileges belonging, as aforesaid, unto the said T. T., and his heirs and assigns, against the claims of all persons whatsoever, will forever warrant and defend. In TRUST, Nevertheless, and for the use, intent and purposes following, and none other, namely: that the said D. D. shall be suffered to remain in the quiet and peaceable possession and enjoyment of the said premises, and their privileges and appurtenances aforesaid, until default be made by the said D. D., in the payment of the negotiable note aforesaid, or any of its renewals or continuations of the same, which may be substituted therefor, or for any part thereof; and then upon the further trust, that if the said C. C., or his assigns, shall be compelled to pay, or shall pay at or after maturity, the said negotiable note, or any part

thereof, or any note or notes given in renewal or continuation of the said note, in whole or in part, then and in either event, the said C. C., or his assigns, may require the said T. T., to sell the said property in pursuance of the terms of this deed. If sale be required by the said C. C., or his assigns, the said T. T. shall, after fixing the time and place of sale, at his discretion, and advertise the same for ——— days in some newspaper printed in ———, sell the said messuage and tenements, and the appurtenances and privileges aforesaid belonging thereto, or such part thereof as may be necessary for the purpose, at public auction, to the highest bidder for cash; and out of the proceeds of such sale shall pay, first, all costs and charges attending the execution of this trust; secondly, shall pay to the said C. C., or his assigns, the amount of money which the said C. C., or his assigns, shall then have paid on account or by reason of his endorsement aforesaid of such note or notes, together with lawful interest thereon from the time of such payment, and the balance, if any, shall pay to the said D. D., or his assigns. And if the said D. D., or his assigns shall fully indemnify and save harmless the said C. C., and his assigns, all loss and damage on account and by reason of the endorsements aforesaid, whether already made, or which may be hereafter made, or other note or notes given in renewal or continuation of the said note first above mentioned, then this deed shall be void, or else shall remain in full force and virtue.

Witness the hands and seals of the parties, the day and year first above written.

D. D. (SEAL.)
T. T. (SEAL.)
C. C. (SEAL.)

NO. 4. CONVEYANCE OF LAND SOLD UNDER DEED OF TRUST
(Sands' Forms, 109; 4 Min. Inst. 1607.)

This indenture, made this ——— day of ———, in the year of our Lord 192—, between T. T. of ———, of the one part, and P. P., of ———, of the other part: Whereas a certain D. D., of ———, by a certain deed bearing date the ——— day of ———, in the year 192—, and recorded in the clerk's office of the ——— court of the ——— of ———, did grant and convey unto the said T. T., his heirs and assigns, all of a certain tract or parcel of land situate and lying in ———, together with the appurtenances and privileges thereto belonging, or in anywise appertaining, in trust to secure a certain debt, to be paid by the said D. D., to one C. C., and whereas by the said deed T. T., his heirs and assigns, were empowered, on failure of the said D. D., or his assigns, to pay the said debt to the said C. C., or his assigns, to sell the said tract or parcel of land, with its appurtenances, or as much thereof as should be found necessary to accomplish the purpose of the said trusts therein contained; and whereas the said D. D. having failed to perform the requirements contained in the said deed, the said T. T., in execution of the said trusts therein declared, did, on the ——— day of ——— in the year 192—, after giving ——— days' notice of the time and

place of sale by an advertisement in the newspaper called the ———, printed in ———, expose to sale the tract or parcel of land aforesaid, with its appurtenances aforesaid, at public auction, to the highest bidder for cash; at which sale the said P. P. became the purchaser thereof, being the highest bidder. Now THIS INDENTURE WITNESSETH, that the said T. T., trustee as aforesaid in the said deed of trust, for and in consideration of the premises, and for the further consideration of ——— dollars to him in hand paid by the P. P. at and before the sealing and delivery of these present, the receipt whereof is hereby acknowledged, which said sum is to be appropriated and applied as by the said deed of trust is directed, doth grant, bargain, sell and convey, release and confirm, unto the said P. P., his heirs and assigns forever, all the tract or parcel of land aforesaid, with the privileges and appurtenances thereto belonging, or in anywise appertaining, situate and lying in ———, containing by estimation (or by survey) ——— acres, be the same, however, ever so much more or less, and bounded as follows: Beginning at (describe the boundaries); it being the same tract or parcel of land conveyed by the deed first above mentioned to the said T. T. by the said D. D., in trust as aforesaid; to have and to hold the said tract or parcel of land, with its appurtenances aforesaid, to the said P. P., and his heirs and assigns forever. And the said T. T., for himself and his heirs, doth covenant and agree with the said P. P., his heirs and assigns, that the said T. T., and his heirs, the title to the said tract or parcel of land, with its appurtenances aforesaid, unto the said P. P., and his heirs and assigns, will warrant and forever defend against the claims of the said T. T., and his heirs, and of all persons claiming by, through or under his or them.

Witness my hand and seal the day and year first above written.

T. T., Trustee. (SEAL.)

NO. 5. NOTICE FOR SUBSTITUTION OF TRUSTEE

(Va. Code, §§ 6298-9.)

To ———:

Take notice that I shall on the ——— day ———, 192—, move the the circuit court of the county of ——— to have ——— substituted as trustee in a certain deed of trust from ——— to ———, trustee, dated ——— day of ———, 192—, and recorded in the clerk's office of the circuit court of ——— county, D. B. ———, p. ———, in the place and stead of the said ———, named as trustee in said deed, which said trustee is dead (or has removed beyond the limits of the State, or declines to accept the trust, or has resigned the trust). This notice is given you as one of the parties interested or supposed to be interested, in the execution of the said trust, and in pursuance of section 6298 of the Code of Virginia and acts amendatory thereto, the undersigned being also interested in the execution of said trust.

Given under my hand, this ——— day of ———, 192—.

No. 6. NOTICE OF APPLICATION TO COURT TO HAVE DEED OF TRUST, MORTGAGE, MECHANIC'S OR VENDJR'S LIEN MARKED SATISFIED
(Code, § 6456.)

To C. C.:

Take notice that I shall on the _____ day _____, 192—, move the circuit court of the county of _____, Virginia, to have marked released and discharged a certain deed of trust from P. P. to T. T., trustee (or mortgage from P. P. to C. C., or mechanics lien filed by C. C. against the property of P. P., or vendor's lien reserved by C. C. on the face of a deed of conveyance to P. P.), dated _____ day of _____, 192—, and recorded in the clerk's office of said court, in _____, p. _____. This notice is given under section 6456 of the Code of Virginia, 1919, and acts amendatory thereto, the undersigned being owner of certain property affected by the existence of said incumbrance.

Respectfully,

P. P.

No. 7. PETITION TO COURT, IN SUCH CASE
(*Idem.*)

To the Honorable Judge of the Circuit Court of the County of _____, Virginia:

Your petitioner, P. P., respectfully represents that he is owner of certain property, described as follows: _____; that there is recorded in the clerk's office of this court in _____, p. _____, a certain deed of trust from P. P. to T. T., trustee (or *mortgage from P. P. to C. C. or mechanic's lien filed by C. C. against the property of P. P., or vendor's lien reserved by C. C. on the face of a deed of conveyance to P. P.*) and bearing date on the _____ day of _____, 192—, which said incumbrance affects the property herein described;

That your petitioner has given C. C., who is the person entitled to such incumbrance, twenty days' notice that he would on the _____ day of _____, 192—, move this honorable court to have the same marked, released and discharged, all of which will appear from the notice of motion herewith filed and returned executed.

Inasmuch, therefore, as twenty years have elapsed since the maturity of said incumbrances, as will appear from the copy of said deed of trust filed herewith, and marked "Exhibit A," which under section 6456 of the Code of Virginia, 1919, and acts amendatory thereof, raises a presumption that said incumbrances has been paid (or *as the said debt has been paid*), your petitioner prays that in pursuance of said statute the said incumbrance be marked, released and discharged. And your petitioner will ever pray, etc.,

P. P.

No. 8. DECREE IN SUCH CASE
(*Idem.*)

In the Circuit Court of ——— County, Virginia:
P. P., Plff. }
 v. } In Chancery.
C. C., Deft. }

It appearing to the court that P. P., who is interested in a certain lot of land against which a certain incumbrance is recorded, which said lot is described as follows: (here describe it), has given twenty days' notice to C. C., the person entitled to such incumbrance, service of which notice was made on the ——— day of ———, 192—, as will appear from said notice filed with the papers in this cause, that he would apply to this court on the ——— day of ———, 192—, to have marked released and discharged a certain deed of trust from ——— to ———, trustee, (or *mortgage from P. P. to C. C., or mechanic's lien filed by C. C. against the property of P. P., or vendor's lien reserved by C. C. on the face of a deed of conveyance to P. P.*), dated ——— day of ———, 192—, and recorded in the clerk's office of this court in ——— P., ———;

And it further appearing to the court that the said C. C. has this day been called in open court and hath not appeared or answered;

And it further appearing that more than twenty years have elapsed since the maturity of said incumbrance, raising a presumption of payment which was not rebutted at the hearing, the court, in pursuance of section 6456 of the Code of Virginia, 1919, and acts amendatory thereof, doth adjudge, order and decree that the clerk of this court do enter on the margin of the page of the book wherein said incumbrance is recorded, as aforesaid, that, more than twenty years having elapsed since the maturity of said incumbrance, a presumption of payment is raised, which was not rebutted at his hearing (*or the said debt has been paid*); which entry when so made (citing the number and page of the order book) shall operate a release and discharge of said incumbrances

No. 9. BILL TO FORECLOSE DEED OF TRUST
[See Hurst's Forms, No. 95.]

No. 10. DEED OF RELEASE OF DEED OF TRUST
(Code §§ 5156, 5164; *Conveyance*, § 3. This form furnished by Mr. S. A. Harris, Attorney at Law, Lynchburg, Va.)

This deed of release, made this 9th day of October, 1920, between T. T., trustee, as hereinafter shown, party of the first part, and C. C. the party of the second part, and D. D., the party of the third part, and the holder of the hereinafter described notes.

Whereas, by deed bearing date on the 31st day of August, 1915 and of record in the Clerk's Office of the Circuit Court of Appomattox County, in Deed Book No. 16, at page 196, the said party of the second

part conveyed to said party of first part, certain real estate in the County of Appomatox, Virginia, described as follows, to-wit: [Here describe the land]; in trust to secure the payment of two notes of the sum of One Hundred and seventy-five dollars, each evidenced by the two notes of the said party of the second part, bearing even date with said deed and payable as shown therein, which have now been fully paid.

Now Therefore This Deed, Witnesseth: That in consideration of the premises, and of one dollar (\$1.00) paid, the party of the first part, trustee as aforesaid, does hereby grant and release with special warranty of title, unto the said party of the second part the real estate hereinbefore described, free from any and all claim by reason of the deed of trust aforesaid.

Witness the following signatures and seals.

T. T. (SEAL.)

C. C. (SEAL.)

DELINQUENT TAX SALES

- § 1. Definitions
- § 2. Taxes a lien enforceable by sale
- § 3. Listing, valuation, and levy
- § 4. Relief against erroneous assessments
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- § 6. Treasurer's return of delinquent list
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- § 16. Redemption of land sold
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- § 20. Effect of tax deed; how defeated

- § 21. "Due process" as affecting tax deed made valid by statute
 § 22. Form under "Delinquent Tax Sales"

§ 1. Definitions.—A delinquent tax sale is a sale of land, in the manner indicated by statute, to pay the taxes assessed thereon, which the owner or no one for him has paid. The purchaser at the sale is commonly called a "tax purchaser," and the title or deed he obtains under the sale, a "tax title" or tax deed."

§ 2. Taxes a lien enforceable by sale.—There is a lien on land for the State taxes and for county or city levies assessed thereon, superior to every other charge on the land, whether by deed of trust, mortgage, judgment, vendor's or mechanics' lien or otherwise though the latter be prior in time (Code, §§ 2271, 2454-5.)

Section 2488 of the Code declaring that the tax deed vests in the grantee such title as was vested in the landowner, refers to the quantity of interest or estate, as, fee simple or for life, and does not mean the purchaser takes the land subject to the liens thereon at the time the taxes were assessed. (94 Va. 756). (2 M's Real Prop. § 1357.)

§ 3. Listing, valuation, and levy.—Every 5 years assessors list and value lands and during each 5 years the commissioners of the revenue make all changes by transfer or in valuation. (Code, §§ 2233, etc., 2266, etc., 2281, etc., 2293, etc; Acts 1920, p. 36.)

Upon the lands thus listed and valued in the land books, which he makes out annually, the commissioner of the revenue levies, that is computes accurately and sets forth in the land books, the amount of tax at the legal rate (Code, § 2280).

If the name is the true name of the freehold owner or so nearly like it, as to make impossible mistaking the person intended, the listing is valid (100 Va 591, 595; 106 Va. 356).

If the owner is dead, the land is to be listed in the name of his heirs or devisees (Code, § 2287),—as "heirs of A" or "devises of A," seems sufficient. It should not continue to be listed for an unreasonable period in one's name after his conveyance, especially where the conveyance is unrecorded (32 Grat. 12). But section 2488 of the Code, makes a tax deed vest in the purchaser the estate that was vested in the party in whose name the land was listed at the commencement of

the year for which the delinquent taxes were assessed, "or in any person claiming under such party;" the latter clause, if constitutional, allowing the land to remain listed indefinitely in the name of a prior owner who has transferred all his interest therein. (2 M's Real Prop., § 1359.)

§ 4. Relief against erroneous assessments.—The person aggrieved may, within two years from the first of September of the year of assessment, apply for relief, making the attorney for the Commonwealth a defendant (Code, § 2385, as amended by Acts 1920, p. 316;) and if the applicant appears erroneously charged and not in default himself, the assessment is corrected (Code, § 2386). (2 M's Real Prop., § 1360.)

§ 5. As to taking personal property first.—Though provision is made for the collection of taxes in the first instance out of personal property by distress or action (Code, § 2410), yet recourse against personal property does not seem essential to the validity of a tax sale of land (Code, § 2426; but see 27 Grat. 789, 800).

§ 6 Treasurer's return of delinquent list.—It is the county or city treasurer's duty to collect the taxes (Code, § 2410). He makes out a list verified by affidavit, which he is to return to court for examination, and the court, being satisfied of their correctness or correcting them if erroneous, shall, after the ratification of the lists by the commissioner of the revenue and the board of supervisors, or the city council, direct the clerk to certify copies to the Auditor of Public Accounts, and to record the lists in the clerk's office in the "Delinquent Tax Book" (Code, §§ 2417, etc., 2428-9).

§ 7. Posting delinquent list and notice of sale.—The clerk delivers a copy of the corrected delinquent list to the treasurer, who posts a printed copy in conspicuous places, or the Auditor may direct a copy to be inserted once in a paper published in the county or city, to which he attaches a notice that the land, or so much as shall be necessary to satisfy the taxes, interest, and charges due thereon, will be sold at public auction on the first Monday of January next succeeding, between 10 a. m. and 4 p. m., in front of the courthouse, unless the taxes due shall be previously paid (Code, § 2460). This notice, unlike the other proceedings preliminary to the tax sale, does not appear in the records of the clerk's office, save only by recital in the treasurer's report of sales, which is

required to be there recorded, after its confirmation by the court (Code, §§ 2465, 2469).

In the absence of a statute curing it, any material error or omission in the publication of the delinquent list, or in the notice of sale, will render the sale invalid; likewise, any material inaccuracy or insufficiency of description of the land, which should follow closely that in the land books, will usually avoid the sale (123 Va. 456). If the description is sufficient to inform the owner, that is all the law requires, but for this purpose it should be such as to enable a stranger to ascertain its location without undue inquiry. The law requiring a printed notice, a sale under a written notice is void; especially is the sale void if there is no advertisement or notice at all. (2 M's Real Prop., § 1363.)

§ 8. Time and place of sale.—Sections 2460-1 of the Code says the sale must take place on the first Monday of January next succeeding, between 10 a. m. and 4 p. m., in front of the courthouse; and the sale may be adjourned from day to day until completed, and if not completed on the last day of the court, it shall be adjourned to the first day of the next court, but notice of such adjournment shall be given by proclamation to the bystanders, and by posting a notice thereof at the front door of the courthouse.

These requirements must be strictly complied with; if a sale were made within the courthouse or the treasurer's office, instead of "in front," it would be set aside. (2 M's Real Prop., § 1364.)

§ 9. How lands and lots sold.—By section 2462 of the Code, the sale of country lands shall be of each tract separately, or of such quantity or part thereof as will satisfy the taxes and levies thereon, with interest and charges; and the sale of city and town lots shall be of each lot separately, or of such undivided interest therein as shall suffice for the same purpose.

While a sale of several tracts together is prohibited, yet it seems the sale should follow the assessment list, and if several adjacent tracts are used and occupied together, and are so assessed, they may be considered as one tract for the purpose of sale.

In general, no land should be sold except what is actually delinquent; so where taxes are assessed against a whole tract, and subsequently an undivided one-third interest is listed sep-

arately and taxes thereon paid, a sale of the whole tract would be void. (2 M's Real Prop., § 1365.)

§ 10. Effect of sale for illegal or excessive taxes.—The illegality of part (however small) of the taxes taints the whole transaction and renders the sale void; and the same is true as to an excessive tax. (2 M's Real Prop., § 1366.)

§ 11. Officer who sells and conveys.—The county or city treasurer makes the sale (Code, §§ 2460-1); while the clerk of the court makes the deed (Code, §§ 2482-3), except where he is purchaser (the treasurer cannot purchase—§ 2463), then by a special commissioner (Code, §§ 2482-3), and if made by anyone else it is void. A sale by the treasurer after his term of office has expired is also void. (2 M's Real Prop., § 1367.)

§ 12. Terms of tax sale.—The statute (Code, §§ 2460-1) not providing for credit, the sale is to be for cash to the highest bidder—i. e., the bidder who will pay the taxes, costs and charges for the least quantity of land. (2 M's Real Prop., § 1368.)

§ 13. Purchaser at the sale.—One whose duty it is to pay the taxes on land partly his own, cannot add to or strengthen his title by allowing the land to be sold, and his purchase operates merely as a payment of the taxes, and the sale is void, the same being true of a tenant in common (see *Co-Tenants*), a tenant for life, a tenant for years under covenant to pay taxes, a mortgagee or mortgagor in possession, etc.; but one holding a defective title may perfect it by purchasing the land at a tax sale, if he stands in no relation of trust to the owner and is implicated in no fraud against him. But the language of section 2488 of the Code throws some doubt on this, it making the purchaser take the title vested in the party assessed with the taxes, that is, the party legally bound to pay the taxes, or, according the supposition above, the tax purchaser himself.

An agent, attorney, trustee, guardian, or other person in a confidential relation, having the control and management of real estate, or a joint tenant or tenant in common (see *Co-Tenants*), cannot purchase at the tax sale, even though he was not supplied with money to meet the taxes. Such a purchase would make him a constructive trustee for the other party.

The treasurer cannot be a purchaser, but the clerk may, a

special commissioner being then appointed to make the deed (Code, §§ 2464, 2483).

If there are no sufficient bids, the treasurer buys the land in the name of the Auditor of Public Accounts for the benefit of the State, and county or city respectively. Provisions are also made for the redemption of such land within two years, or, if unredeemed, for the resale thereof by the State—see section 15, below. (2 M's. Real Prop., §§ 1369-72.)

§ 14. Treasurer's return of sales; "Delinquent Land Book."—Within 60 days the treasurer must report to court the names of the persons charged with delinquent taxes, the quantity and description of the land charged, the amount of taxes due, the quantity of land sold, the names of the purchasers, the amount of the purchase money and the date of the sale, reciting also in his report that notice of the sale was advertised as required by law; which report is to be signed by the treasurer and verified by his oath in the form given, containing an allegation that he is "not directly or indirectly interested in the purchase of any of the said real estate" (Code, §§ 2465, 2468). The officer's failure to follow any of the above directions is fatal to the tax title.

The court, if it finds the report correct, or correcting it if erroneous, shall confirm the same and order it to be recorded and properly indexed in the "Delinquent Land Book" (Code, § 2469).

A like list of all lands purchased by the State is to be returned, confirmed, and recorded in the "Delinquent Land Book" (Code, § 2489).

Section 2474 of the Code provides that any person aggrieved by the court's confirmation of the sale may apply to the court for relief at any time previous to the execution of the tax deed; and upon proof that the taxes are not justly due from any cause or that the land is not liable therefor, the court may set aside and annul the sale and exonerate the land from the said taxes, and order the purchase money returned to the purchaser; the treasurer, purchaser, and Commonwealth's attorney being given at least 5 days' notice of the application, and the latter defending the same. (2 M's Real Prop., § 1373.)

§ 15. Resale of land bought in by State; how application to purchase made.—When by reason of lack of bids, the

State is compelled to buy in the land, it holds it for two years during which the owner may redeem, after which if not redeemed, it is open to purchase from the State by private parties, upon following the proceeding outlined by the statute (Code, § 2495) : In brief, the proceeding is by application filed with the court for the purchase for the amount of taxes, and such additional taxes as would have accrued to date, if the State had not made the purchase, with interest thereon; the application to be accompanied by a deposit of at least 10 per cent. of the purchase price, setting out the names of the owner and the person in whose name it is listed, or their heirs and administrators or executors, or of any trustees, mortgagees, or beneficiaries disclosed by any records not more than 20 years old in the clerk's office; and copies of the application must be served on the parties named therein in the same manner as a process in a suit, or, if the parties are non-residents or cannot be found after diligent search, an order of publication may issue, in the form given in the statute. If no one having a right to redeem appears within 4 months and redeems by paying the clerk all accrued taxes, penalties, interest, and costs, and fees and costs attending the application, including a penalty payable to the applicant of 10 per cent. of the proposed purchase price, in no case to be less than \$2 nor more than \$5, then the applicant, within 5 days from the expiration of the 4 months above mentioned, may complete the purchase by paying to the clerk the balance of the purchase money. If the applicant does not exercise his right within the 5 days, he forfeits not only his right to the land, but to the amounts deposited by him with the clerk, and the land is again thrown open to purchase. After his payment to the clerk, the purchaser, in order to complete his purchase, must have a report made to the court by the county surveyor or city engineer, or some other competent surveyor appointed by the court, specifying the metes and bounds of the land, the owners of adjoining lands, and giving such further description as will identify the land, which report is to be recorded. The surveyor's report, however, may, in the court's discretion, be dispensed with. The purchaser then obtains his tax deed, and may compel the clerk to execute it upon petition to court. If the deed be not made within one year from the application (unless hindered by judicial proceedings) the right of re-

demption revives to the owner or others entitled to redeem, and continues until the deed is made.

The application must substantially comply with the requirements of the statute, making all interested persons designated by the statute parties, and giving them the notice required by law; otherwise the clerk may be enjoined from receiving the purchase money or making a deed. The application and subsequent proceedings are invalid and of no effect as to mortgages, deed of trust creditors or others, whose names appear of record and who are not duly notified. (2 M's. Real Prop., §§ 1374-5.)

§ 16. Redemption of land sold.—

(1) *Who may redeem*—The statute (§ 2475) provides that the owner of the land, his heirs, or assigns, or any person having the right to charge the land with a debt, may redeem the same.

The person offering to redeem must have some title or connection with land; as one holding as a trustee, executor or agent, or one having an interest in the land as a tenant, a lien creditor, or the holder of an equitable title thereto; but not a mere stranger, unless his payment of the redemption money is accepted by the purchaser.

A redemption does not create a new title, but merely cuts off the rights of the purchaser, and so a lawful redemption by one co-tenant operates in favor of all. But such tenant is entitled to possession of the whole tract, and to have the lien of the tax sale kept alive until his co-tenants reimburse him.

(2) *Four months' notice of purchase*.—No deed will be made to a purchaser until he has given four months' notice of his purchase, to the person in whose name the real estate sold stood at the time of the sale, and to subsequent grantees of record, their executors, heirs, and devisees, and to the trustees, mortgagees, and beneficiaries or creditors as shown by the records (of not over 20 years' standing) in any deed of trust or mortgage on said real estate, or their administrators or executors; and the person entitled to redeem the said real estate may do so at any time before the expiration of the said four months, although such time extend beyond the two-year period of redemption (Code, § 2482). The notice is to be served as in case of notices generally—section 6041 (108 Va. 6).

A deed made to a purchaser before the 4 months' notice

is given, is void, the failure not being cured by section 2488—see section 20 and 21, below (112 Va. 347).

(3) *To whom redemption money payable.*—In the case of a private purchaser, the redemption money is payable to the purchaser, his heirs, or assigns, and not to the clerk (124 Va. 321); but if he or they refuse to receive it, or do not reside or cannot be found in the county or city, the money may be paid to the clerk of the court, who shall endorse the fact of such payment in the "Delinquent Land Book," opposite the entry of the tract or lot (Code, § 2477).

If the State is purchaser, the redemption money is always paid to the clerk, who shall endorse it as above; so, also, when the redemption is sought, after an application to purchase from the State (Code, §§ 2491, 2495); and so long as the State retains the land, the owner may with the court's consent, for good cause, redeem part only, which a private person cannot do, either where the purchase is at the tax sale or upon a resale by the State (Code, § 2493).

(4) *Period allowed for redemption.*—The period is two years from the day of sale, or the termination of the disabilities of infancy, insanity, or imprisonment, exceeding in no case 20 years (Code, §§ 2475, 2479, 2482); and if no deed be made within one year after the 2 years, the property may thereafter be redeemed (§ 2478); see (7), below. But if the State is the purchaser, the owner may redeem at any time while the State retains the land; and when the State, after two years, sells to a private person, he must serve his application on the owner, after which the latter has 4 months wherein to redeem (Code, § 2495).

(5) *Amount to be paid in redemption.*—It is all the taxes, levies, penalties, interest, and costs due at the time of the sale, and those that have accrued since, or would have accrued if the land had not been sold (Code, §§ 2475-6, 2487, 2495); and it is a misdemeanor for the purchaser to demand more, punishable by a fine from \$5 to \$100 (Code, § 2478). But redemption statutes, unlike taxing statutes, are to be construed liberally; and so a slight mistake in the payment of the redemption money will not avoid the redemption.

(6) *Retrospective legislation.*—The right of redemption is not a vested right, but a mere special privilege, and so a statute passed after a tax sale shortening the period of re-

demption or even destroying the right entirely, is not unconstitutional; but as against the tax purchaser the time of redemption cannot be extended after the sale, for his transaction is in the nature of a contract with the State, or of vested rights, which cannot be impaired, nor divested without due process of law.

(7) *Purchaser's right to a tax deed.*—After two years (see (4), above), and the giving of the 4 months' notice (see (2), above, the purchaser is entitled to a deed. The tax deed completes the purchaser's title; it gives him the legal, where before he had only an equitable title. He is entitled to it after the expiration of the period of redemption (two years), when he performs all the precedent conditions imposed by law, and may compel its execution by motion or petition to the court (Code, §§ 2485-6, 2495). For who makes the deed, see section 11, above.

If made before the full expiration of the redemption period of two years, it is invalid; in computing the time, the day of sale is excluded, and so a deed made on the last day of the two years is premature. (2 M's Real Prop., §§ 1376-81.)

§ 17. General requisites of tax deed.—The statute (§§ 2482, 2485) requires a deed (i. e., an instrument under seal), with special warranty, but the omission of "special warranty" or the substitution of "general warranty", will not invalidate the deed. It must be executed by the proper officer (see section 11, above) and at the proper time (see section 16, (4) and (7), above).

As to the recitals to be contained in the deed, the statute (§ 2482) says it "shall set forth all the circumstances appearing in the clerk's office in relation to the sale". The legislature seems to intend the tax deed to present on its face a complete history of the tax title as it appears in the clerk's office, as follows (116 Va. 424):

(1) The listing and valuation of the land (see section 3, above.)

(2) The levy of the tax (see section 3, above);

(3) The list of delinquent taxes (see section 6, above);

(4) The treasurer's report of sales (see section, 14, above);

(5) The notice or advertisement of the sale (see sections 7, 14, above);

(6) The order of the court confirming the sale (see section 14, above);

(7) The surveyor's report, with plat and certificate (see section 15, above).

The omission to recite any of these circumstances appearing in the clerk's office will invalidate the tax deed (118 Va. 173). (2 M's. Real Prop., §§ 1382-3).

§ 18. Recordation of tax deed.—The statute (§ 2488) says when the purchaser has obtained a deed and "the same has been duly admitted to record," the title shall stand vested in the grantee. The recordation, therefore, seems necessary to its validity, even as between the parties (116 Va. 10). (2 M's Real Prop., § 1384.)

§ 19 Title conferred when purchased by a tax deed.—After the tax sale, and prior to the expiration of the redemption period (see section 16, (3), above), the purchaser has an equitable title, defeated if the owner redeems; and by statute (§ 2470) he may, after confirmation of the sale by the court, enter and hold possession, provided the owner is not in actual possession, or if he is in possession, the purchaser may require him to redeem within 60 days, which if he fails to do, the purchaser may enter and take possession.

After the execution of a valid tax deed the purchaser's equitable title becomes a legal title, the grantee taking such an interest as formerly belonged to the delinquent tax-payer, whether in fee simple or for life, but free from all liens, conditions, or incumbrances—see section 1 and 13, above.

The statute (§ 2488) says, when the purchaser, his heirs, or assigns has obtained a deed and the same has been duly recorded, "the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made, at the commencement of the year for which such taxes were assessed, or in any person claiming under such party." (2 M's Real Prop., § 1385.)

§ 20. Effect of tax deed; how defeated.—Section 2488 of the Code says that the title under the tax deed is "subject to be defeated only by proof:

(1) That the taxes for which the land was sold were not properly chargeable thereon; or

(2) That the taxes have been paid; or

(3) That the notice of the sale, where made to a person other than the Commonwealth, or the notice of the application to purchase in case of a resale by the State, has not been duly given; or

(4) That the payment or redemption was prevented by fraud or concealment on the part of the purchaser;

Provided that no suit shall be brought to set aside, cancel, or annul such deed, except for fraud, as herein provided, unless within two years after the same is duly admitted to record."

The two years' limitation applies only to persons against whom the taxes are assessed, and those claiming under them, and not the third parties with respect to whom the sale and deed are void *ab initio*—from the beginning (116 Va. 10).

Under the first of these heads, viz., that the taxes are not properly chargeable on the land, the owner may show within two years:

(1) An improper or unlawful listing of the land for taxation, including a misleading description of the land, or of the owner (100 Va. 591), or the listing of land exempt from taxation (78 Va. 431);

(2) An improper valuation of the land listed;

(3) An improper or excessive levy of the tax by the commissioner of the revenue; or

(4) The unconstitutionality of the law under which the tax is levied.

Under the second head, it may be shown that the taxes have been paid, and probably that the land had been lawfully redeemed.

As to all steps or circumstances relating to the sale not embraced in one or the other of the four heads, the tax deed is made conclusive evidence of the validity of the purchaser's title; and as to these four heads, it is *prima facie* presumed good (113 Va., 624; 116 Va., 83), subject to be rebutted by proof within two years, and after two years the deed is conclusively valid, except it may be attacked for fraud or concealment in preventing the payment of the taxes or the redemption of the land by the owner. (2 M's Real Prop., § 1386.)

If the additional taxes, levies, costs, and charges which the purchaser has paid are known alone to him and he refuses

to disclose the amount to the owner, he is guilty of such fraud and concealment as will defeat a tax deed thereafter secured by him (118 Va. 670).

§21. "Due process" as affecting tax deed made valid by statute.—The United States Constitution (14th Amendment says no State shall deprive any person of property "without due process of law," which requires (1) that the property be properly listed for taxation in books open to the public, showing the property taxed, its owner, and the amount of the tax; (2) that the property be valued by an impartial tribunal, with an opportunity to the owner to contest the valuation, which valuation shall also be a public record; (3) and that upon such valuation the tax shall be levied or estimated in the proportion designated by the tax law. None of these jurisdictional steps can be dispensed with, though the manner of performing them is with the legislature (96 Va. 272; 97 Va. 401).

"Due process" further demands, when the land is put up for sale, (1) that the owner shall have an opportunity to protect himself against an unjust or illegal taking of his property, and to that end demands that he shall continue to be liable for the taxes at the time of the sale; (2) that he shall have notice of the tax sale; (3) that there shall be an actual sale; (4) that it shall be at the time and place duly appointed; (5) that the sale shall be public, *bona fide* and without fraud.

So that, the State legislature cannot constitutionally by section 2488 (see section 20, above) make a tax deed valid or conclusive at once where any of the eight jurisdictional steps above have been omitted; though it may make it *prima facie* valid, or conclusive after a reasonable time, as, two years. The statute embraces five of the above requisites and makes the deed only *prima facie* evidence of their proper performance or existence, until after two years, when it is made conclusive, all of which is constitutional; but the statute does not embrace the third, fourth, and fifth under the second group of steps above, which, however, by a forced or strained construction might be embraced under the fourth head of the statute (see section 20, above), providing that, despite the tax deed, the owner may show fraud or concealment whereby the payment or redemption was prevented; but if they cannot be shown under this head, they may be shown despite it, for an actual, public, *bona fide* sale, at a time and place appointed, whereof

the owner must be notified, is the very foundation of the purchaser's title, and constitutes the very opportunity to the owner to prevent the sacrifice of his property which "due process" demands he shall have. (2 M's Real Prop., §§ 1358, 1387.)

A legal or equitable owner of land sold for taxes may file a bill in equity for removal of a cloud upon his title by reason of such sale (Code, § 2498).

§ 22. For under "Delinquent Land Sales."—

No. 1. FORM OF "TAX TITLE" DEED
(Code, § 2482; 4 Min. Inst. 1608.)

Know all men, that, whereas a certain tract, or parcel of land, hereinafter described, was listed for taxation and valued, and taxes thereon levied and assessed in said county according to law; and whereas the said land was returned delinquent for the non-payment of the taxes levied and assessed thereon in a list of such delinquent lands, verified by his affidavit, was returned by the treasurer of the said county to the circuit court of said county for the years —, —, and —; a copy of which said list as corrected by the said court was made and delivered by the clerk of the said court to the said treasurer, and a printed copy of the same was posted and published by the said treasurer, advertising the time and place of the sales of delinquent lands for the non-payment of taxes levied and assessed thereon for the said years, with the certificate of oaths attached thereto, was returned to the said court, on the — day of —, 192—, within sixty days after the completion of the said sales, according to law, and the said court, seeing no cause to doubt the correctness of the said list, did confirm the said report and order it to be recorded in the clerk's office of the said court; and whereas by the said list of sales so reported and confirmed, it appears that D. D. was charged with taxes to the amount of — dollars, and that the quantity of land represented to be charged with the said taxes was stated to be — acres of land, the local description of which was — (Insert the local description); that the amount of taxes due thereon was —; that the quantity of land sold was —; that the said sale was made on the — day of —, in the year 192—; that a part of the tract (or *the entire tract*) of land was sold; that the name of the purchaser was P. P., and the amount of purchase money was —; and whereas the said purchaser had a report made by S. S., the surveyor of the said county of —, (or *a surveyor appointed by the court for the purpose*) to the court thereof, according to the terms of section 2480 of the Virginia Code of 1919, and acts amendatory thereof, and the said court, upon the examination of the plat and certificate of survey, made by the said surveyor and returned to the court, having found it to be correctly made, in conformity with said section 2480 or 2481 (or as the case may be), of these said Code, and acts amendatory thereof, did, on the — day of —, 192—, order the same to be recorded; and whereas, the said purchaser P. P., has given to D. D., the person in whose

name the land so sold stood at the time of the said sale (and to subsequent grantees, their representatives, heirs, and other persons named in section 2482 of the said Code, and acts amendatory thereof &c.) four months' notice of said purchase, as required in said section of the Code; and whereas two years have expired since the said sale; and the purchaser of the said real estate, alleging that the same has not been redeemed, has applied for a deed conveying the same to him: Now this deed witnesseth, that in consideration of the premises, and for the further consideration of one dollar to me in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, I, C. C., clerk of the circuit court of the said county of —, in pursuance of section 2482 of the Code of Virginia of 1919, do grant, bargain, sell, and convey unto, the said P. P., the purchaser aforesaid, the said real estate so sold to him as aforesaid, and specified in the report, plat, and certificate so returned by the county surveyor as aforesaid.

Witness the following signature and seal.

C. C., CLERK. (SEAL.)

DEPOSITIONS

See Affidavit

- § 1. By whom deposition taken, and how certified
 - (1) By whom in Virginia
 - (2) By whom out of Virginia
- § 2. Notice to be given of taking a deposition
- § 3. How witness summoned to give his deposition
- § 4. Caption, examination, certificate, and return
 - (1) Caption
 - (2) Examination of witnesses
 - (3) Certificate
 - (4) Return, etc.
- § 5. Fees for taking and certifying depositions and affidavits
- § 6. When depositions may be read
- § 7. How testimony perpetuated by depositions
- § 8. Various forms under "Depositions"

§ 1 By whom deposition taken, and how certified.—A deposition is an oath or affirmation reduced to writing wherein the opposite party has had an opportunity to cross-examine the witness, taken and certified by some competent authority. At common law a deposition could only be used in a court of equity, that being the only form in which testimony could be presented in that tribunal, the common law courts prefer-

ring a failure of justice rather than receive evidence otherwise than by oral testimony in the presence of the court and jury. To prevent failures of justice, the courts of equity undertook, at length, in aid of trials at law, to issue commissions to take depositions in specified cases; and finally by statute, in Virginia authority to take depositions to be read in equity and in certain causes at law was given to certain officers, who, under the present law, act without commission. (Code, §§ 6625-7, 5252, 6235.)

(1) *By whom in Virginia.*—By section 6225 of the Code: "In any pending case the deposition of a witness, whether a party to the suit or not, may be taken in this state by a justice, or notary, or by a commissioner in chancery (of course within their respective counties or corporations, and not elsewhere), and, if certified under his hand, may be received without proof of the signature to such certificate."

(2.) *By whom out of Virginia.*—The deposition of a witness, whether a party to the suit or not, who resides out of this state, or is out of it in the service thereof, or of the United States, may be taken before any commissioner appointed by the Governor, or any justice, notary, or other officer authorized to take depositions there, or if in a foreign country, before any one agreed upon in writing (which is to be returned with the deposition), or any American minister, plenipotentiary, charge d' affairs, consul-general, vice-consul, commercial agent appointed by the U. S. Government, or any other U. S. representative in a foreign country, or the mayor, or other magistrate of any city, town, or corporation in such country, or any notary therein. He administers the oath and certifies under his official seal, but if he have none, the genuineness of his signature is authenticated by some officer of that State or country, under his official seal, except where taken by a justice in another State or before some one agreed upon, when no seal or authentication is necessary. (Code, § 6226.) The statute omits to make any provision for the deposition of one temporarily sojourning out of Virginia, and not in the service thereof or of the United States.

An affidavit that a witness or party resides out of the State, or is out of it, is *prima facie* evidence of the fact, though made by a party, and without previous notice. (Code, § 6224.)

§ 2. *Notice to be given of taking a deposition.*—By sec-

tion 6228 of the Code: "Reasonable notice in writing shall be given to the adverse party of the time and place of taking every deposition. It need not be in any particular form, nor served in any particular manner, but it shall be deemed sufficient in any form or served in any manner if it conveys the needed information, and is actually received a reasonable time before the time fixed for the taking."

So a service on the wife, though not explained to her, is sufficient, if the husband received the notice in ample time; and a notice by mail, received in time, is sufficient. For designated forms of service of notices in general, see *Notices*.

As to non-residents, besides notice by publication, in a newspaper once a week for 4 successive weeks (Code, § 6043), a notice to take depositions personally served "on the counsel of such party, or on any one of such counsel, if there be more than one, shall have like effect as if it were served upon the party, provided the time between the service of notice and taking the deposition be sufficient for conveying by ordinary course of mail a letter from the place of service to the place of residence of the party, and a reply from that place back to the place of service, and then for the counsel to attend at the place of taking the deposition." (Code § 6229.) And if the court think the notice not reasonable, it should reject the deposition upon exception taken.

But if there be no resident counsel, and the order of publication whereby the suit is commenced has been duly executed, no other publication shall be thereafter required in that cause, in any proceeding in court, or before a commissioner, or for the purpose of taking depositions, unless specially ordered by the court. (Code, § 6071.)

As to how and on whom a notice to a corporation or common carrier may be served, see *Corporations*, section 12.

The certificate of the editor, publisher, business manager, or assistant business manager, or the affidavit of any other person, is sufficient proof of publication of the notice. (Code, § 6224.)

The notice must be reasonable; so that, if the notice be to take depositions on the same day, at different places, and the adversary cannot conveniently attend all of them, he may select where he will attend, and the depositions taken elsewhere will be suppressed; if, however, his counsel attend at the

several places and cross-examine, the objection is obviated, but not so if there be no notice and the party merely attends.

The notice must be of the time and place, and if it omits either, it is insufficient; and, therefore, a deposition taken at a time or place not mentioned in the notice must be suppressed, unless the change was assented to by the adverse party, his agent or attorney. Indeed, the adverse party's attorney at law may waive notice on behalf of his client, or consent to receive it.

As to adjournment, the better opinion seems to be that it is competent for the functionary taking a deposition, of his own mere authority, regularly to adjourn the taking from day to day, or from time to time, as occasion may require, even where the notice makes no provision for adjournment. But it is well established that where the notice provides for an adjournment, there must be a regular adjournment, which must be as stated in the notice, and not otherwise. Thus, if the notice provides for an adjournment from day to day, an adjournment from the eighth to the twelfth, and thence to the nineteenth, is not permissible, and depositions taken on any day but the first must be suppressed, unless the adversary, his agent, or attorney consented to the adjournment. And so if there be no regular adjournment to another day, any deposition taken on such other day is without authority and void.

The notice also describes, in general terms, the character of the suit in which the deposition is to be read, which it must do with substantial correctness. (H's. G. & M. pp. 18, 19.)

§ 3. How witness summoned to give his deposition.—

(1) *By whom summons is issued.*—A summons for a witness to attend and give his deposition may be issued by the "person before whom, or the clerk of the court of the county or corporation in which the attendance is desired, or, if it be desired before a justice, by such or any other justice. It shall express on whose behalf, and in what case or about what matter, the witness is to attend." (Code, § 6217.)

(2) *How summons is served.*—Such summons may be directed to the sheriff or sergeant of the county or corporation, and executed by him as a notice is served. (Code, § 6217.) See *Notice*.

For proceeding against a witness who fails to attend, or who attending, refuses to testify, see *Evidence*, section 2.

§ 4. Caption, examination, certificate, and return.—

The several formal parts of a deposition complete are the caption, the examination of witnesses, and the officer's certificate.

(1) *Caption.*—The caption sets forth whose deposition it is, before what authority taken, the commission, if any, under which it is taken, that it was taken pursuant to notice, at the time and place and between the hours indicated therein, and, with at least substantial correctness, in what cause and on whose behalf it is to be read. It is best to attach the notice, and the commission, if there be one, to the deposition, though not indispensably necessary, for their existence may be shown in any way—e. g., by the caption, or by the certificate, or partly by each. (H's G. & M., p. 20.)

(2) *Examination of witnesses.*—The same methods and principles apply in written as in oral examinations—the same doctrine of competency of witnesses, admissibility of evidence, and modes of interrogation. The party introducing the witness examines him in chief, then the adversary cross-examines, and the first if he think fit, re-examines him.

The witness ought to answer the questions orally and from memory, his answer being written down as nearly as may be in his own words; and it is inadmissible for him, much more for his attorney, to write his depositions or answers beforehand. But it is allowable for the party or his council, previous to the examination, to direct the witness' attention orally or in writing, to the facts upon which he is to be examined; and furthermore, the witness may refresh his memory as to such facts by examining books and papers, and may make memorandum, especially of dates and amounts, and may use the same upon examination only for refreshing his memory, and if after so doing he can, independently thereof, remember the facts, his evidence is legal and admissible.

A deposition ought to be kept open during the hours appointed in the notice, and if closed within those hours, it should be re-opened for cross-examination at the instance of any one interested who was not present at the taking.

When completed, the deposition should be signed by the witness; but this is not indispensable, for the officer's certificate is a sufficient authentication. (H's G. & M., p. 20.)

(3) *Certificate.*—The officer's certificate must state either

independently or by reference to the caption, that the deposition of the witnesses (naming them) were duly taken, sworn to and subscribed (if that be the fact) before such officer, at the time or times and place or places, and for the purpose recited in the notice; and if taken in pursuance of a commission, that fact must be set forth, and that the proceeding was conformable thereto. (Code, § 6232; H's G. & M., pp. 20-21.)

(4) *Return, etc.*—By section 6232 of the Code: "A deposition, when completed, shall be certified and returned by the officer taking it, or sealed and sent through the postoffice, or by some public carrier, to the clerk wherein the suit or other proceeding in which the deposition is taken is pending, or to the commissioner or person before whom it is to be read; and when received, the clerk, commissioner, or other person to whom sent, after endorsing thereon the time it was so received, shall file it among the papers of the suit or other proceeding."

The depositions are usually placed in sealed envelopes, with style of case endorsed across the envelope.

§ 5. Fees for taking and certifying depositions and affidavits.—By section 3585 of the Code: "A notary or other officer returning affidavits or depositions of witnesses, and a commissioner returning a report, shall state at the foot thereof the fees therefor, to whom charged, and, if paid, by whom." The fee of a justice, notary, or commissioner for taking and certifying affidavits or depositions of witnesses, where done in an hour, \$1.00; if not done in an hour, for any additional time, at the rate per hour of 75c. (Code, §§ 3480 and § 3481, as amended by Acts 1922.) But see *Notary Public*.

§ 6. When depositions may be read.—See Code, §§ 6228, 6233-4.

§ 7. How testimony perpetuated by depositions.—See Code, § 6235.

§8. Various forms under "Depositions."

No. 1. NOTICE TO TAKE DEPOSITIONS
(Code, §§ 6228-9, 6071.)

To D. D.:

Take notice, that on the — day of —, 192—, at the office of —, in —, between the hours of — a. m. and — p. m. of that day, I shall proceed to take the depositions of A. B. and others, to be read as evidence in my behalf, in a certain action at

law (or *suit in equity*) depending in the ——— court for the ——— of ———, wherein I am plaintiff and you are defendant; and if, from any cause, the taking of the said depositions be not commenced, or if commenced, be not concluded on that day, the taking thereof will be adjourned from day to day (or *from time to time*) at the same place and between the same hours, until the same shall be completed.

Respectfully yours,

L. P., by counsel.

When parties live within convenient distance, 5 days' notice is usually reasonable, though less may be. In other cases, 10 to 15 days will be not too much.

No. 2. CAPTION TO DEPOSITIONS, THE DEPOSITIONS, AND ADJOURNMENT
(H's G. & M., pp. 19-21)

The depositions of A. B. and others, taken before me, J. T., a justice of the peace (or *notary public* or *commissioner in chancery* for the ——— court) for the ——— of ———, pursuant to notice hereto annexed, at ——— (the place indicated in the notice), in ———, on the ——— day of ———, 192—, between the hour of ——— a. m. and ——— p. m. to be read as evidence in behalf of P. P., in a certain action at law (or *suit in equity*) depending in ——— court for the ——— of ——— wherein P. P. is plaintiff and D. D. is defendant.

Present: A. P., attorney for the plaintiff; A. D., attorney for the defendant.

The witness, A. B., being sworn, deposes as follows:

First question by attorney for plaintiff——?

Answer——.

Second question by same——?

Answer——.

Cross-Examination:

First question by attorney for plaintiff——?

Answer——?

Second question by same——?

Answer——.

Re-Examination:

First question by attorney for plaintiff——?

Answer——.

Second question by same——?

Answer——.

An further this deponent saith not.

A. B., witness.

(Continue with any other witnesses, in like manner as above, writing their answers as far as may be in their own words.)

No other witness appearing, the further taking of these depositions is continued until to-morrow (or other time) at the same place (or other place) and between the same hours.

J. T., J. P. (N. P. or other officer.)

Office of——,

—— day of ———, 192—.

DEPOSITIONS

Present: A. P., attorney for the plaintiff.

A. D., attorney for the defendant.

(Continued as in case of the first witness.)

And further this deponent saith not.

B. C., witness.

No. 3. CERTIFICATE AUTHENTICATING DEPOSITIONS

(H's G. & M., pp. 20-21))

Virginia—county (or corporation) of —, to-wit:

I, J. T., a justice of the peace (*notary public* or *commissioner in chancery for the — court*) for the county (or corporation) aforesaid, in the said state, do hereby certify that the aforesaid depositions of A., B., and C. were duly taken, sworn to, and subscribed (if that be the fact) before me, at the time and place and for the purpose in the caption hereto mentioned.

Given under my hand, this — day of —, 192—.

J. T., J. P. (*N. P.* or *com'r in ch'y*).

No. 4. SUMMONS FOR A WITNESS TO GIVE HIS DEPOSITIONS

(Code. §§ 6217, 6220-1.)

Commonwealth of Virginia:

To the sheriff (or sergeant) of the — of —, greeting:

We command you that you summon A. B., B. C., and C. D. to appear at the office of —, in —, in said —, on the — day of —, 192—, before J. S. a justice of the peace (*notary public* or *commissioner in chancery of the — court*), for said —, to testify and the truth to speak on the behalf of P. P., in a deposition then and there to be taken, in a certain action at law (or *suit in equity*) depending in the — court for said —, wherein the said P. P. is plaintiff and D. D. is defendant; and have then there this writ.

Given under my hand, this — day of —, 192—,

J. T., J. P. (*N. P.*, *com'r in ch'y*
or *clerk of — court*) of — of —).

No. 5. REPORT OF NON-ATTENDANCE OF WITNESS, OR HIS REFUSAL TO TESTIFY

(Code. §§ 6220-1.)

To the — court (or to the honorable judge of the circuit or corporation court) for the — of —:

A. B., who was duly summoned to appear at the office of —, in the — of —, in said —, on the day of —, 192—, before me, J. T., a justice of the peace (*notary public* or *commissioner in chancery of the — court*) for said —, to testify and the truth to speak on the behalf of P. P., in a deposition then and there to have been taken, in a certain action at law (or *suit in equity*) depending in the — court for said —, wherein the said P. P. plaintiff and D. D. is defendant, has failed to attend (or *has refused*

to be sworn or to give his evidence after having attended) at the time and place required, and I am requested to report the fact to you, that proper means may be used to compel the said witness to attend (or to be sworn or to give his evidence).

J. T., J. P. (*N. P., com's in ch'y*).

DESCENTS AND DISTRIBUTIONS

See *Advancement*

I. DESCENT

- § 1. Course of descents generally
- § 2. What estate may descend
- § 3. Descent cannot be prevented by deed or contract; may, by homicide
- § 4. How collaterals of the half blood inherit
- § 5. What shares the heirs take
- § 6. When ancestor or heir an alien
- § 7. Bastards, and children legitimated or adopted
 - (1) Bastards
 - (2) Children legitimated
 - (3) Adopted children
- § 8. How after-born children take
- § 9. Descents from minors in certain cases
- § 10. In division of estate, advancements to be brought in—
See *Advancement*

II. DISTRIBUTIONS

- § 11. Distribution of personal estate
- § 12. When and how benefits of will renounced, and effect thereof
- § 14. In division of surplus, advancements to be brought in—
- § 13. Rights of husband and wife barred by adultery, etc.
See *Advancements*

Descents has reference to real estate and distributions to personal property.

I. DISCOUNTS

§ 1. Course of descents generally.—By section 5264 of the Code, as amended by Acts 1922:

“When any person having title to any real estate of inheritance shall die intestate, (i. e., without a will) as to such estate, it shall descend and pass in parcenary (i. e., partnership) to such of his kindred, male and female, are not alien enemies, in the following course:

- (1) To his children and their descendants.

(2) If there be no child, nor the descendant of any child then to his or her father and mother, or the survivor.

(3) If there be no father nor mother, then to his or her brothers and sisters, and their descendants.

(4) If none such, then the whole shall go to the surviving consort of the intestate.

(5) If none such then one moiety shall go to the paternal, the other to the maternal kindred, of the intestate, in the following course:

(6) First to the grandfather and grandmother.

(7) If none such, then to the great grandfathers, or great grandfather, and great grandmothers, or great grandmother.

(8) If none, then to the brothers and sisters of the grandfathers and grandmothers, and their descendants.

(9) And so on, in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

(10) If there be neither maternal nor paternal kindred, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate."

The law provides two general courses of descent, the first commencing with the children of the ancestor and their descendants, and ending with his mother, brothers, and sisters, and their descendants; and the second beginning with the grandfather, and ending with the husband or wife of his or her kindred. (2 Va. Dec. 62). If there be no husband or wife, nor kindred of either, the estate escheats to the Commonwealth and goes to the Literary Fund for the benefit of the schools (Va. Const., §§ 134-5; Code, § 738; and *Escheat and Escheator*).

Descent follows the course of blood, and is either lineal, (or direct), i. e., where one descends directly from the other, as, in case of father and son, grandfather and grandson, etc.; or collateral, i. e., where persons descend from the same common ancestor, but not one from the other, as, the relation between brothers, between uncle and nephew, between cousins, etc.

In the lineal or direct line, every generation, reckoning either upwards or downwards, constitutes a degree. (2 M's. Real Prop., §§ 972-6.)

§ 2. What estate may descend.—The statute says, “any real estate of inheritance,” which means any real estate that may be inherited by heirs, and includes legal or equitable estates, and remainders, reversions, and executory limitations—see *Real Estate*, sections 1 and 2; *Remainder*; *Reversion*.

§ 3. Descent cannot be prevented by deed or contract; may by homicide.—Descent takes place in every case where the owner of real estate dies without a will; and hence no deed or agreement, in the ancestor's lifetime, by which one's children or other heirs renounce their right to inherit their ancestor's estate, is binding, unless, indeed, he by his last will sees fit to hold them to their agreement (102 Va. 124; 105 Va. 670).

But “no person shall acquire by descent or distribution, or by will, any interest in the estate of another whom he has killed in order to obtain such interest” (Code, § 5274).

§ 4. How collaterals of the half blood inherit.—Section 5265 of the Code says: “Collaterals of the half blood shall inherit only half so much as those of the whole blood; but if all the collaterals be of the half blood, the ascending kindred, if any, shall have double portions,” i. e., the same as collaterals of the whole blood in the same degree, or twice as much as the collaterals of the half blood.

Persons related in the lineal or direct line, as, father or mother and son or daughter, can never be of the half blood to each other, there being no such thing as half son or a half grandson, etc. Half bloods are always collaterals, as half brothers or sisters, half uncles or nephews, etc., they having but one ancestor in the same degree in common, as where they have separate fathers or mothers, the other parent being common to both. (2 M's Real Prop., § 996.) See notes after statute in section 1, above.

§ 5. What shares the heirs take.—By section 5266 of the Code: “When the children of the intestate (the deceased), or his mother, brothers, and sisters, or his grandmother, uncles, and aunts, or any of his female ancestors living, with the children of his deceased lineal ancestors, male or female, in the same degree, come into the partition, they take per capita or by persons; and where, a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes or by stocks, that is to say, the

shares of their deceased parents; but whenever those entitled to partition are all in the same degree of kindred to the intestate (the deceased), they shall take per capita or by persons." See notes after statute, in section 1, above.

That is, if the heirs are all in the same degree of relationship to the ancestor, they take per capita or by persons (i. e., equally); if in unequal degree, the nearest take per capita and the more remote per stirpes or by stocks (i. e., the shares of their deceased ancestors, being in the degree of the nearest (6 Rand. 355; 27 Grat. 326)).

§ 6. When ancestor or heir an alien.—It is no bar to descent that the ancestor (whether living or dead), through whom one derives his descent from the deceased, is or has been an alien, or foreigner (Code, § 5267); and by section 66 of the Code: "Any alien, not an enemy, may acquire by purchase or descent and hold real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." See *Aliens*.

§.7. Bastards, and children legitimated or adopted.—

(1) *Bastards*.—"Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother as if lawfully begotten," and so also children of former slaves in certain cases (Code, § 5268).

Under this statute, the mother is the only parent recognized by the law, but she is as fully recognized as if the bastard were legitimate. He may not only inherit from and transmit inheritance to, his mother, but may do the same from or to any person related to him on the part of the mother, as if he were lawfully begotten. Hence he is in law the brother of any other son of the mother, whether bastard or legitimate, by the same or another father; but since his father is in law unknown, he must necessarily be regarded as of the half blood only to other children of his mother, though in fact all have the same father, so that a bastard, in respect to collaterals, is always a half blood, and so takes only a half portion; and also all his collateral relatives (on the part of the mother) are related to him in the half blood. (2 M's Real Prop., § 997.)

(2) *Children legitimated*.—By section 5269 of the Code: "If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after the

marriage, shall be deemed legitimate." See *Parent and Child*, section 1.

It is not material whether the child be living or dead at the time of the marriage or of the acknowledgment—at least if the dead child has left descendants. Thus, a bastard, who died before the marriage of the parents, leaving a legitimate child, is legitimated upon the marriage of the parents and his recognition by the father, so that his child takes as heir to the father (2 Grat. 203).

By section 5270 of the Code: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate." See *Marriage*, section 2, and *Divorce*, section 3.

Thus, the issue of a bigamous marriage, though absolutely void, are nevertheless legitimate, and therefore may inherit from their father as well as their mother (5 Call, 143; 90 Va. 390). (2 M's Real Prop., § 998.)

(3) *Adopted children*.—A minor (but no longer an adult) may be adopted by simple court proceedings—see *Adoption*. By such adoption, the natural parents are divested of all legal rights and obligations in respect to the child and the child shall be free from all legal obligations of obedience and maintenance in respect to them; such child shall be, to all intents and purposes, the child and heir at law of the person so adopting him or her, entitled to all the rights and subject to all the obligations of a child of such person begotten in lawful wedlock; but on the decease of such person and the subsequent decease of such adopted child without issue, the property of such adopting parent still undisposed of shall descend to his or her next of kin and not to the next of kin of such adopted child. (Code, § 5333, as amended by Acts 1st 22.) p. 514.)

This statute leaves it doubtful whether such adopted child can also inherit from the collateral relatives of the adopting parent, and whether he can transmit inheritance either to the adopting parent himself or to the latter's collateral relatives or lineal descendants. (2 M's Real Prop., § 999.)

§ 8. How after-born children take.—By section 5271 of the Code: "Any person *in ventre sa mere* (in the mother's womb), who may be born in 10 month's after the death of the intestate (the testator without will) shall be capable of taking

by inheritance in the same manner as if he were in being at the time of such death."

§ 9. Descents from minors in certain cases.—By section 5272 of the Code: "If an infant (i. e., a minor) die without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent from whom it was so derived, if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent."

In order for this statute to apply, (1) the minor must have derived the property from one of his parents—from a grandfather or grandmother, etc., is not sufficient; (2) he must have derived it by gift, will or descent—not by purchase or with consideration; (3) the property must have been derived from the parent directly, and not indirectly, as through a brother, etc.; (4) the minor must have remained so up to death; (5) the land is to go to the minor's kindred, not to the kindred of the parent (except individually). So, where a minor dies without issue and with brothers and sisters, of whom some are of the whole blood to him (having the same father and mother), while some are of the half blood only (having only one common parent—the one from whom the minor has derived the land by gift, will, or descent),—while all these brothers and sisters are equally related to the common parent, and would take equally as heirs of the parent, they do not, it would seem, says Prof. Raleigh C. Minor, take equally as the heirs of the minor, but the half blood will take only half shares. (2 M's Real Prop., § 994.)

§ 10. In division of estate, advancements to be brought in.—See *Advancements*.

II. DISTRIBUTIONS

§ 11. Distribution of personal estate.—By section 3273 of the Code: "When any person shall die intestate (i. e., without will) as to his personal estate or any part thereof, the surplus (subject to the provisions of chapter 274) after payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, to whom, and in which real estate is directed to descend, (see section 1, 4 to 8, 11, above), except as follows:

(1) *Of infants or minors.*—The personal estate of an infant (minor) shall be distributed as if he were an adult;

(2) *Of married persons.*—If the intestate (one dying without will) was married, the surviving husband or wife shall be entitled to one-third of such surplus, if the intestate left surviving issue of the marriage which was dissolved by the death of the intestate, or of a former marriage; but if no such issue survive, the surviving husband or wife shall be entitled to the whole of such surplus."

And if there be no other distributee, the surplus goes to the Commonwealth, into the Literary Fund, for the benefit of the schools (Code, §§ 5275, 738; Va. Const., §§ 134-5). See *Escheat and Escheator*.

Homicide bars distributee—see section 3, above.

§ 12 When and how benefits of will renounced, and effect thereof.—By section 5276 of the Code, as amended by Acts 1922: "When any provision for a husband or a wife is made in the consort's will, the survivor may, within one year from the time of the admission of the will to probate, renounce such provision. Such renunciation shall be made either in person before the court in which the will is recorded, or by writing recorded in such court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record under chapter 211 (as to "Record of Deeds and other Writings"). If such renunciation be made, or if no provision for the surviving husband or wife be made in the will of the decedent, the surviving consort shall, if the decedent left surviving issue of the marriage which was dissolved by the death of the consort or surviving issue of a former marriage, have one-third of the surplus of the decedent's personal estate mentioned in section 5273 (see section 1, above); or if no such issue survive, the surviving consort shall have one-half of the aforesaid surplus; otherwise, the surviving consort shall have no more of the said surplus than is given him or her by the will."

"Provided, however, that if any such will is of a doubtful import as to the amount or value of the property the husband or wife of such consort is to receive thereby or thereunder and a suit in equity is pending wherein the said will will be construed in such respect, the court in which said suit is pending shall, within said year, on the application of such

surviving husband or wife, if he or she, as the case may be, so desire, enter an order extending the time within which such survivor is to make such renunciation for such additional period beyond such year as will allow said survivor a reasonable time, not exceeding six months, for making such renunciation after a final order shall have been entered in said suit construing such will in such respect, either by a trial court or any appellate court to which it may be appealed; and provided further, that such survivor may, within said year, have the right to institute and maintain any such suit for the proper construction of said will in such respect."

This statute applies to personal estate only. For renunciation of will, in case of real estate, see *Dower*, section 5, (2), (c).

§ 13. Rights of husband and wife barred by adultery.—By section 5277 of the Code: The provisions of section 5273 and 5276 (see section 11 and 12, above) are subject to the qualification that if either husband or wife leave the other and live in adultery, he or she shall have no part of the personal estate as to which the other consort dies intestate (without will), unless before such death they were reconciled and live together."

By section 5140: "If the husband wilfully deserts or abandons his wife, and such desertion or abandonment continues until her death, he shall be barred of all interest in her estate as tenant by the curtesy, distributee, or otherwise."

Dower is also barred by the wife's adultery—see *Dower*, section 5, (2), (a). But curtesy is not barred by the husband's adultery, nor is any interest of the wife's forfeited by her desertion, save the marriage tie itself, as in the case of the husband, who is also punished therefor—see *Married Woman's Property and Other Rights*, section 7, and *Desertion and Non-Support*.

§ 14. In division of surplus, advancements to be brought in.—See *Advertisements*.

DESEPTION AND NON-SUPPORT

(Acts 1922, p. —, amending Acts 1918, p. 759, and in lieu of Code, §§ 1936-9.)

§ 1. Punishment for desertion or non-support of wife or child.—“Any husband who shall, without just cause, desert or wilfully neglect or refuse or fail to provide for the support and maintenance of his wife, and any parent who shall desert or wilfully neglect or refuse or fail to provide for the support and maintenance of his or her male child under the age of sixteen years, female child under the age of seventeen years, or child of either sex of whatever age who is crippled or otherwise incapacitated for earning a living, (such wife, child or children being then and there in destitute or necessitous circumstances), shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not exceeding \$500, or in the case of a husband or father, be sentenced to the State convict road force at hard labor for a period of not less than 90 days nor more than 12 months, or both; or in lieu of such fine being imposed, he or she may be required to suffer a forfeiture of an amount not exceeding the sum of \$500 and said fine or forfeiture may be directed by the court to be paid in whole or in part to the wife or to the guardian, curator, custodian or trustee of the said minor child or children, or to some discreet person or responsible organization designated by the court to receive the same.

“In the event that the cities or counties of this State or any of them shall establish workhouses, city farms, or work squads on which prisoners are put to work, persons convicted of non-support under the provisions of this act may be committed to said farms, workhouses or work squads, instead of the convict road force. Persons sentenced to the State convict road force or to a workhouse or city farm, under the provisions of this act, shall, when released therefrom be returned to the court or justice having exercised original jurisdiction in the case and by said court or justice be placed on probation upon the terms and conditions and in the manner hereinafter prescribed for the probation of original offenders.

“It shall be the duty of the board of supervisors of the

county, or of the council or other governing body of the city within the boundaries of which any work is performed under the provisions of this act to allow and order payment, at the end of each calendar month, out of the current funds of said county or city, to the court which originally sentenced such prisoner for the support of the wife of such prisoner a sum not less than 50 cents nor more than \$1 for each day's work performed by such prisoner, and 25 cents per day additional for each child coming within the provisions of this act, but in no event shall the amount paid to such wife and children exceed \$1.75 per day. In the event that no wife is included in the order of support, payments hereunder for the support of a child or children of such prisoner shall be made to the said court at the rate of not less than 50 cents nor more than \$1 for the first child and 25 cents for each additional child, provided that the total amount so paid shall not exceed \$1.75 per day.

"If, however, such prisoner shall be employed on the State convict road force or other public work of the State, the sum or sums provided for above shall be paid by the State Highway Commissioner out of the funds provided for the construction and maintenance of the public roads or other public work, as the case may be." (Acts 1922, p. —, § 1.)

§ 2. How proceedings instituted and concluded.—"Proceedings under this act may be instituted upon petition verified by oath or affirmation, filed by the wife or child, or by any probation officer upon information received, or by any other person having knowledge of the facts, which said petition shall set forth the facts and circumstances of the case. Upon the filing of said petition the court or the judge thereof in vacation may cause an investigation of said case to be made by a probation officer or other person designated for that purpose, who shall report thereon to the court, and the court may, after considering said report and hearing the complainant, in its discretion dismiss said petition or cause the husband or father as the case may be, to be brought before it by summons or warrant issued by said court, and the court shall thereupon proceed to hear and determine said case on its merits. Or if no such investigation be ordered by the court, it shall forthwith issue its summons or warrant against the husband or father, and upon the execution thereof

shall proceed as above. If the person summoned as herein provided fails, without reasonable cause, to appear as therein directed, he may be proceeded against as for contempt of court, and the court may proceed with the trial of the case in his absence and render such judgment as to it may seem right and proper, or it may continue the case to some future date, provided that if the trial be proceeded with in the absence of the defendant and judgment of conviction be entered against him, he may, within 30 days after such judgment of conviction is rendered make application to the court to have said case re-opened, and after due notice to the original complainant, for good cause, the court may re-open said case and enter such judgment or order as may be right and proper. Except as hereinafter provided, no warrant of arrest shall issue against any person coming within the terms of this act, but all proceedings shall be instituted upon petition as aforesaid. Provided, however, that upon affidavit of the wife or other person that there is reasonable cause to believe that the husband or father is about to leave the jurisdiction of the court with intent to desert said wife, child or children, any justice of the peace of said city or county, may issue his warrant for such person returnable before such court.

"It shall be the duty of the chief of police, sheriff, or probation officer in any city, town or county of this State when, in his opinion, a person in his jurisdiction is guilty of failure to support his family, to bring such person before the court." (Id., § 2.)

§ 3. Jurisdiction; appeal.—"Proceedings under this act shall be had in the circuit court of the counties, and before the police justices or corporation court of the cities; provided, however, that in cities and counties where such court shall be established, the juvenile and domestic relations court shall have exclusive original jurisdiction in all cases arising under this act. The person accused shall have the same right of appeal as provided by law in other similar cases; provided, however, that any order of court requiring support of wife or children shall remain in full force and effect until reversed or modified by judgment of a superior court, and in such interim, said order shall be enforceable by the court entering same, and said court may punish for violation of such order as for contempt. After a judgment of conviction and

entry of order of support from which no appeal is taken the hearing in the appellate court on an appeal from any subsequent order, modification or amendment shall be restricted to the particular matter or order appealed from. The justice and the ministerial officers acting under this act shall be entitled to the same fees as are now or shall hereafter be allowed in misdemeanor cases." (Id., § 3.)

§ 4. Temporary orders for support.—At any time before the trial, upon motion of the complainant, with notice to the defendant, the court may enter such temporary order as may seem just, providing for the support of the neglected wife or children, or both, *pendente lite*, and may punish for violation of such order as for contempt. (Id., § 4.)

§ 5. Periodical payments; recognizance; change of order; non-residence of dependant; suspension of sentence; new offenses.—"Before the trial, with the consent of the defendant, or at the trial on entry of a plea of guilty, or after conviction, instead of imposing the penalties hereinbefore provided, or in addition thereto, the judge or justice, in his discretion, having regard to the circumstances of the case and to the financial ability or earning capacity of the defendant, shall have the power to make an order, directing the defendant to pay a certain sum or a certain percentage of his earnings periodically, either directly or through the court or a probation officer, to the wife or to the guardian, curator or custodian of the said minor child or children, or to an organization or individual designated by the court as trustee, and to suspend sentence and release the defendant from custody on probation, upon his or her entering into a recognizance with or without surety, in such sum as the court may order and approve. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court upon such date as may be specified by the court, or whenever, in the meantime, he or she may be ordered so to do, and shall further comply with the terms of such order, or any subsequent modification or amendment thereof, then such recognizance shall be void, otherwise in full force and effect. Any order of support or amendment thereof entered under the provisions of this act shall remain in full force and effect until annulled by the court of original jurisdiction, or

the court to which an appeal may be taken, provided, however, that such order of support or terms of probation shall be subject to change or modification by the court from time to time as circumstances may require, but no such change or modification shall effect or relieve the surety of his obligation under such recognizance, provided notice thereof be forthwith given to such surety.

"Whenever the accused is outside the territorial jurisdiction of the court, instead of requiring his or her arrest and personal appearance before the court, the court may allow the accused to accept service of the process or warrant and enter a written plea of guilty. The court may thereupon proceed as if the accused were present and enter such order of support as may be just and proper, requiring the accused to enter into the recognizance hereinbefore mentioned. For the purposes of this act the court may authorize the entering into of such recognizance outside the territorial jurisdiction of the court before such official of the place where the accused or his surety may be and under such conditions and subject to such stipulations and requirements as the court may direct and approve. The provisions of this act as to the entering into of recognizances outside the territorial jurisdiction of the court shall likewise apply to any renewal of any recognizance heretofore or hereafter entered into in any desertion and non-support case.

[This act provides that in cities of 40,000 or more population, the court may charge the defendant a certain per centage for collection.]

"The authority of the court to suspend sentences hereunder may be exercised at any time after conviction and before the completion of the sentence, and as often as the court may deem advisable and to the best interests of the parties, provided that such period or periods of time as may be actually served by the defendant either on the roads or while in jail awaiting transfer to the roads, shall be allowed against and deducted from the original sentence.

"Any person sentenced hereunder who, after the completion of such sentence, shall continue in his failure, without just cause, adequately to support his wife or children, as the case may be, may again be sentenced, as for a new offense, in the same manner and under like conditions as herein provided,

and so on from time to time, as often as such failure or failures shall occur." (Id., § 5.)

§ 6. Violation of orders; extension or renewal of probation; forfeiture of recognizance.—"If at any time the court may be satisfied by information and due proof that the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original charge, or sentence him or her, under the original conviction, or annul suspension of sentence, and enforce such sentence, or in its discretion may extend or renew the term of probation, as the case may be. Upon due proof that the terms of said order have been violated, the court shall in any event have the power to declare the recognizance forfeited, the sum or sums thereon to be paid in the discretion of the court, in whole or in part to the defendant's wife, or the guardian, curator, custodian or trustee of the said minor child or children, or to an organization or individual designated by the court to receive the same." (Id., § 6.)

§ 7. Proof.—"Proof of desertion or of neglect of wife, child or children by any person shall be *prima facie* evidence that such desertion or neglect is wilful; and proof that a person has left his wife, or his or her child or children in destitute or necessitous circumstances, or has contributed nothing to their support for a period of 30 days prior or subsequent either or both to his departure, shall constitute *prima facie* evidence of an intention to abandon the said family. In every prosecution under this act both husband and wife shall be competent witnesses to testify against each other in all relevant matters, including the facts of such marriage; provided that neither shall be compelled to give evidence incriminating himself or herself." (Id., § 7.)

§ 8. Venue of offense; extradition.—"Any offense under this act shall be held to have been committed in any county or city in which such wife, child or children may be at the time of desertion, or in which such children may be or remain, with the knowledge and acquiescence of the accused, in destitute or necessitous condition, or where the accused shall be found in this State. Whenever the judge or justice within whose jurisdiction such offense is alleged to have been committed shall, after an investigation of the fact and circumstances thereof, certify that in his opinion the charge is well

founded and the case a proper one for extradition, or in any case if the cost of extradition is borne by the parties interested in the case, the person charged with having left the State with the intention of evading the terms of his or her probation or of abandoning or deserting his wife, or his or her child or children, or failing to support them, shall be apprehended and brought back to the county or city having jurisdiction of the case in accordance with the law providing for the apprehension and return to the State of fugitives from justice, and upon conviction punished as hereinabove provided." (Id., § 8.)

§ 9. Probation officers; appointment.—"For the purpose of more fully carrying into effect the provisions of this act, probation officers may be appointed as provided by chapter 350 of the Acts of General Assembly of Virginia of 1918, or as may be hereafter provided by law." (Id., § 9.) See *Probation Officers*.

§ 10. Duties of probation officers.—"The said probation officers shall ascertain the name and address and such facts in relation to the antecedent history and environment of the person or persons committed to his charge as may enable him to determine what corrective measures will be proper in the case, and shall exercise constant supervision over the conduct of such person or persons, and his or her family and make report to the judge or justice whenever he shall deem necessary to be required so to do, and he shall use every effort to encourage and stimulate such person to reformation and to effect a reconciliation between the estranged couples. Whenever said chief of police, sheriff or probation officer shall become satisfied that such person is violating the directions, rules or regulations given or prescribed by the judge or justice, as the case may be, for his or her conduct, the said chief of police, sheriff or probation officer shall have authority to arrest such person after a proper *capias* or warrant has been issued for such person and forthwith carry him before the court or justice, before whom he or she was first brought, and said court or justice may thereupon proceed as hereinbefore provided." (Id., § 10.)

DETINUE

(See "Burks' Pleading & Practice" (new ad.), same title.)

See *Justice of the Peace*, div. I., section 3, (1) and (2).

- § 1. Definition
- § 2. What necessary to support detinue
- § 3. Plaintiff may take property upon giving bond; retaken by defendant upon his giving bond
- § 4. Forms under "Detinue"

§ 1. Definition.—Detinue is the form of an action to recover specific personal property unlawfully withheld (whether originally taken lawfully or unlawfully), together with damages for the detention; or if the specific property is not to be had, then the value thereof, with damages. (4 Min. Inst. 537-9.)

§ 2. What necessary to support detinue.—It is necessary to support an action of detinue, (1) that the plaintiff should have an absolute or special property in what he seeks to recover; (2) he should have the right to the immediate possession of it at the time the warrant was brought; and (3) the defendant must have had possession of the property some time before the action was brought, though it matters nothing that he has it not at the bringing of the action, or has improperly parted with it prior or subsequent thereto. (4 Min. Inst. 539-41.)

§ 3. Plaintiff may take property upon giving bond; retaken by defendant upon his giving bond. See *Justice of the Peace* div. I., section 3, (2).

§ 4. Forms under "Detinue."—[See nos. 5 to 9, under *Justice of the Peace*, div. I., Section 4.

DISTURBING WORSHIP, SCHOOLS AND
LITERARY SOCIETIES

- § 1. Disturbance of religious worship a misdemeanor
- § 2. Disturbance of schools and literary societies
- § 3. Appointment of police for religious meetings
- § 4. Form of "description" in warrant or indictment

§ 1. Disturbance of religious worship a misdemeanor.—

By section 4576 of the Code: "If any person wilfully interrupt or disturb any assembly met for the worship of God, or being intoxicated, disturb the same, whether wilfully or not, he shall be guilty of a misdemeanor (punishable by a fine not over \$500, or jail not over 12 months, or both—Code, § 4782), and any justice or other conservator of the peace may put him under restraint during religious worship, and require him to enter into a recognizance for his good behavior for a period not exceeding twelve months."

At common law, to disturb a congregation assembled for religious worship, or for any other lawful purpose, endangers a breach of the public peace, and is therefore an indictable misdemeanor. Under the statute, the means whereby the disturbance is effected need not be alleged. If the assembly be met for religious worship, as a camp-meeting, and the disturbance occurs at night, after the services are closed for the day and the congregation have retired to rest, the offense, nevertheless, falls within the statute. (H's G. & M., p. 395; 3 Grat. 624.)

§ 2. Disturbance of schools and literary societies a misdemeanor.—By section 4577 of the Code: "If any person wilfully interrupt, molest, or disturb the exercise of any free school or any other school or of any literary society, or being intoxicated, disturb the same, whether wilfully or not, he shall be guilty of a misdemeanor," punishable by a fine not over \$500, or jail not over 12 months, or both (Code, § 4782).

§ 3. Appointment of police for religious meetings.—By section 4580 of the Code, as amended by Acts 1922: "The supervisor or any justice of the peace of the magisterial district wherein a camp meeting or any other religious meeting is held may in his discretion, upon the written application of the conductor of any meeting, in writing appoint as many persons as temporary police as he may deem necessary to preserve order at such meeting, who shall have, within three miles of such meeting, the powers of conservators of the peace, and shall receive the same fees as are allowed sheriffs of counties for making arrests and carrying prisoners to jail, and when appointed by a supervisor shall receive \$2 per day to be paid out of the county treasury."

§ 4. Form of "description" in warrant or indictment.—

No. 1. DISTURBANCE OF PUBLIC WORSHIP. (Code, §§ 4576, 4782.)

DESCRIPTION: —

"wilfully (or, being intoxicated) did interrupt and disturb an assembly of people then and there met for the public worship of God in a certain house there situated, called the ——— church (or other place, as the case may be)."

DIVORCE

§ 1. The two kinds of divorce

§ 2. Causes for divorce from bed and board

(1) Cruelty

(2) "Reasonable apprehension of bodily hurt"

(3) "Abandonment or desertion"

§ 3. Causes for divorce from bond of matrimony

(1) Adultery

(2) Sentence to the penitentiary

(3) Accused felon fugitive from justice two years

(4) Wilful desertion for three years

§ 4. When divorce from bed and board set aside, or converted into absolute divorce

§ 5. Suits for divorce

§ 6. Foreign divorces

§ 1. The two kinds of divorce.—There are two kinds of divorce; (1) Divorce *a mensa et toro* (i. e., "from board and bed"), which merely separates the parties for an indefinite time, but always in hope of reconciliation, and without disturbing the marital rights or relations as touching either person or property (as support, etc., but these are usually fixed by the decree), further than such separation necessarily implies; they are still husband and wife, with all the privileges and obligations of that relation, save that of living together, unless a further effect be given as is usually done, by a special order of court—Code, §§ 5111-12). (2) Divorce *a vinculo matrimonii* (i. e., "from the bond of marriage"), which terminates and finally dissolves the relation, as in the case of voidable marriages for causes existing at

the time, as named in section 3 under title *Marriage*, which are dissolved *ab initio* (i. e., "from the beginning"), and so looked upon for most purposes as having never existed; while in other cases, the marriage is dissolved only from the time of the decree, and the effects and consequences which have previously attached, especially as to vested rights to property, still remain for the most part, unless otherwise ordered by the court, as is usually done.—Code, § 5111. (1 Minor, 279.)

§ 2. Causes for divorce from bed and board.—Section 5104 of the Code says, "A divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, abandonment or desertion."

(1) *Cruelty*.—Cruelty is anything that tends to bodily harm and thus renders cohabitation unsafe, or that involves danger of life, limb, or health. There may, however, be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health, as personal violence, and, which, therefore, would afford grounds for relief by the court; but what merely wounds the feelings, without being accompanied by bodily injury or actual menace—mere austerity of temper, petulance of manner, rudeness of language, want of civil attention and accommodation, or even occasional sallies of passion that do not threaten harm, although they be high offenses against morality in the married state—does not amount to legal cruelty. (30 Grat. 320-1; 83 Va. 806.)

If the complainant is the aggressor, provoking, ill-treatment, by violent and outrageous conduct, a separation is denied, and the party left to reform her or his disposition and manners.

If the offended party continues to live with the other as husband and wife, the cruelty is condoned or forgiven, but if the offense is repeated, the condonation is done away with. (1 Minor, 282).

(2) "*Reasonable apprehension of bodily hurt*."—This and cruelty are closely interwoven, the latter embracing the former. The fear of hurt must be "reasonable," not a fear arising

from a fine and diseased sensibility. While petty vexations may in time break down such a constitution, relief must not be found in the courts, but by decent resistance or prudent conciliation, the succors of religion or the consolation of friends (1 Minor, 285).

(3) "*Abandonment or desertion.*"—Abandonment or desertion (these words seem synonymous) is the actual breaking off of matrimonial cohabitation (i. e., living together as husband and wife), combined with the intent to desert, without legal excuse or cause, and without the consent of the other. The intent to desert, which is usually the principal thing to be considered, may be proved by a declared intention never to return, absence for a long time without reasonable necessity, making no provision for a wife when able to do so, prohibiting the other from following, and the like. Where there is no collusion, the letters of the parties may be used. (1 Minor, 285-6.) See, also, *Evidence*, section 1, (5), (c).

Desertion may be justified by showing such conduct of the other as would be ground for divorce; nothing short of this will justify wilfull desertion (108 Va. 108).

In the case of desertion by the wife, it is the duty of the husband to seek a reconciliation and to invite her to return (118 Va. 724).

§ 3. Causes for divorce from bond of matrimony.—

These may be causes existing at the time of the marriage, some of which makes the marriage absolutely void without decree of court, and others voidable only by decree of court—see sections 2 and 3, under title *Marriage*; or they may be causes arising subsequent to the marriage, as follows (Code, § 5103):

- (1) *Adultery*.—But the divorce will not be granted, if the parties voluntarily cohabit after knowledge of the adultery, or if it occurred more than five years before the suit was brought, or was committed by the procurement or connivance of the plaintiff (Code, § 5110); or if the defendant can show adultery on the part of the plaintiff (1 Minor, 281).

In granting a divorce for adultery, the court may restrain guilty party from marrying again, but this restraint may, for good cause shown, be rescinded after six months—not before, because in the absence of such restriction neither party can marry again within that time (Code, §§ 5113-14).

Adultery may be proved by circumstantial evidence, such as going into a brothel, especially if he shuts himself up in a room with a strumpet (30 Grat. 307; 86 Va. 768; 88 Va. 12).

(2) *Sentence to the penitentiary*.—If cohabitation is resumed after the confinement, that cause is condoned. Pardon does not restore his or her conjugal rights. (Code § 5103.)

(3) *Accused felon fugitive from justice two years*.—See Code, § 5103.

(4) *Wilful desertion for three years*.—In such case, "divorce may be decreed to the party abandoned," which also divorces the other party; and if before the lapse of that time, a divorce from bed and board has been granted, it may, upon application of the party injured and satisfactory evidence taken before or at the time, be converted into an absolute divorce, if the court thinks no reconciliation has taken place, or is probable, and that they have not cohabitated in the meantime (Code, § 5103, 5115). For the law of desertion, see section 2, (3), above.

§ 4. When divorce from bed and board set aside, or converted into absolute divorce.—See Code, § 5115.

§ 5. Suits for divorce.—For jurisdiction of suits to affirm or annul marriages, or to obtain divorces, when such suits are maintainable, how instituted and conducted; order of publication, testimony, and what orders court may make pending the suit, and also upon decreeing a divorce, and law prohibiting advertising of offers to obtain divorces, see Code, § 5105, as amended by Acts 1922, and § 5106, as amended by Acts 1920, p. 503, §§ 5107-9, 511-12, 5116.

The petitioner must have been an actual *bona fide* resident here for one year. (Code, § 5105, as amended by Acts 1922.)

It should be noted that husband and wife can now testify for and against each other in divorce cases, but no divorce can be granted on the uncorroborated evidence of the parties (Code, §§ 6210, 5106).

For how process or notice served, in divorce cases, see Code, §§ 6042, 5108.

§ 6. Foreign divorces.—A divorce in a foreign country or in another State, obtained in accordance with the laws of that country or State, would seem to be valid here and everywhere. (1 Minor, 305-6.)

DOGS

- § 1. License required
- § 2. Amount of tax
- § 3. Dog tag and collar
- § 4. When dog may run at large
- § 5. Procedure for not paying tax
- § 6. Game warden or other person to kill dog where found running at large without tag, or killing sheep
- § 7. Fees of game warden
- § 8. Punishment of warden for failure of duty
- § 9. Compensation for damage done by dog
- § 10. Dog license fund
- § 11. Department of game and inland fisheries to enforce act
- § 12. Conflicting acts repealed
- § 13. Mad or sheep-killing dog to be killed; fine for concealing
- § 14. Dog-fighting punished

§ 1. **License required.**—On dogs over 4 months of age, to be paid on or before February 1st, or afterwards as soon as 4 months old or he comes into person's possession, but no abatement for less than a year. (Acts 1920, p. 602, § 1.)

§ 2. **Amount of tax.**—On every male and spayed female, \$1; unspayed female, \$3; kennel tax for not over 12 dogs belonging to him or in training, \$10; or for any number, \$15. (Id., § 2.)

§ 3. **Dog tag and collar.**—On payment, the party is given a receipt, and a metal license tag, which must be attached to a substantial collar furnished by the owner, and worn at all times, except when hunting. A new tag can be had from the treasurer for 10 cents. (Id.)

§ 4. **When dog may run at large.**—It is unlawful for a dog without a tag to run at large at any time; but with a tag he may do so, day or night. Kennel dogs must be kept confined, unless accompanied by the owner or his agent; but in case of foxes or deer hounds when in chase, or returning home, they may be let out from under such control. (Id., §§ 2, 3, 9.) Dogs are not allowed to run at large in the capitol square, under penalty of being clubbed or killed, and the owner fined \$1 to \$10. (Code, §§ 412-13.)

§ 5. **Procedure for not paying tax.**—The Commissioner of Game and Inland Fisheries (who has a list of all taxes paid) through county, city and town game wardens, proceeds after May 1st, to obtain warrants against persons in default at

that time, and upon conviction, they are fined \$5 to \$100, with costs; and if the fine and license tax, are not forthwith paid, the dog shall be killed by the game warden, or other person designated by the justice, but this does not release the fine or tax due. (Id., § 27.) The treasurer is required to furnish the Commissioner of Game and Inland Fisheries a list of those who have paid the license tax. (Id., § 2.) If the commissioner of the revenue would report to the treasurer each year all dogs over 4 (instead of 3, as formerly—Code, § 2316) months old, those in default would thus be easily ascertained.

§ 6. Game warden or other person to kill dog running at large without tag, or killing sheep.—The game warden must, and anyone may, notify the owner, if known, where a dog without a license tag is found running at large, and if again so found, or if in the first case the owner was not known, or if any dog, whether wearing a tag or not, be found killing, injuring or chasing sheep, or killing or injuring any domestic animal, the game warden shall kill the dog forthwith, and any other person finding a dog doing so may also kill him on sight. If the warden or other person have reason to believe that a dog is thus misbehaving, he may get a warrant from a justice, requiring the owner, or custodian of the dog, if known, to appear before him, and if upon the evidence, it appears the dog is a sheep killer, or is guilty of other depredation as above, he is ordered immediately killed. If a dog on which license has not been paid, is found running at large, and he has no known ownership, the game warden must kill him on sight. The person killing a dog must burn or bury him. (Id., § 4.) For burial or cremation of animals and fowls generally, see *Animals, etc.*, section 6.

§ 7. Fees of game warden.—He gets \$2 for each dog killed, payable out of dog fund, payable by board of supervisors, or the city or town council, upon account verified by oath. (Id., § 4.)

§ 8. Punishment of warden for failure of duty.—A warden failing or refusing to perform any duty imposed by this act, is punishable by a fine of \$5 to \$20. (Id., § 4.)

§ 9. Compensation for damage done by dog.—"Any person, firm or stock company taxed by the State who shall

have any stock or fowl killed or injured by any dog shall be entitled to receive compensation therefor at the assessed value of such stock and the fair value of such fowl out of the fund derived from dog licenses, and in addition thereto he shall recover from the owner of such dog or the person having such dog under his control at the time the damage is done, in an appropriate action at law, the difference between the assessed value and the full value of such stock or fowl, and in case of any person being bitten by a mad-dog he shall recover from such fund the costs of necessary treatment, not to exceed \$200." (Id., § 5.)

§ 10. Dog license fund.—Of this fund 15 per cent. goes to credit of department of game and fisheries, and the remaining 85 per cent. is applied by the treasurer to payment of damages and fees, in the order in which claims are presented; if fund is not sufficient, claim may be paid first another year. Any surplus fund may be applied to the roads or schools. (Id., § 6.)

§ 11. Department of game and inland fisheries to enforce act.—(Id., § 8.)

§ 12. Conflicting acts repealed.—"All acts or parts of acts, local or general, in conflict with this act, are hereby repealed." (Id., § 8.) This act indirectly repeals sections 2316-26; and does it not also repeal the long time distinction enjoyed by Richmond, Petersburg, Alexandria, and Henrico county, under section 4445 of the Code? Or, shall their dogs still be personal property though the license tax has not been paid? perhaps the better. See *Animals, etc.*, sections 9 and 12.

§ 13. Mad or sheep-killing dog to be killed; fine for concealing.—Any justice, on proof that any dog is mad, or has been bitten by a mad-dog, or has killed or worried any sheep (see section 6, above), shall order such dog to be killed; and if the owner of a dog so ordered to be killed, conceal him, or cause him to be concealed, to prevent the order from being executed, he is fined \$4 for every day of such concealment. (Code, §§ 1551-2.)

§ 14. Dog-fighting punished.—Fighting dogs for a prize or betting on, or charging for attending such fight, is fineable \$100 to \$500. (Code, §§ 4550.)

DOMICILE AND RESIDENCE

§ 1. Definition and nature of domicile

§ 2. Definition and nature of residence

§ 1. Definition and nature of domicile.—Domicile is a residence at a particular place, accompanied by positive or presumptive proof of an intention to remain there for an unlimited time; so two things must concur therefor, (1) residence, and (2) the intention to remain there permanently. A person may be a resident of one place and have his domicile at another. He can have but one domicile, but may have several residences. Residence with no present intention of removal, constitutes domicile. Mere change of place is not a change of domicile; mere absence from a fixed home, however long continued, cannot work the change. There must be the intention to change the prior domicile for another; and to constitute a new domicile there must be residence in the new locality and intention to remain there. Until the new domicile is acquired, the old one remains. Burden of proof is on the party alleging the change. Change of domicile deprives one of his homestead rights. (4 Min. Inst., 411-12; 29 Grat. 229, 239-40; 30 Grat. 718, 719-20; 76 Va. 428, 429-30; 78 Va. 180.)

§ 2. Definition and nature of residence.—Residence or inhabitancy is the place of abode, dwelling, or habitation, for some continuance of time. To reside in a place is to abide or dwell there permanently, for a length of time, as contradistinguished from a mere temporary locality of existence. "Residence," however, is often used to express different meanings, according to the subject-matter. In statutes relating to taxation, settlements, right of suffrage, and qualification for office, it means essentially the same as domicile, while in attachment cases, actual residence is intended as distinguished from legal residence, in its popular sense of abiding or dwelling in a place for some continuance of time. But the casual or temporary sojourn of one here, whether on business or pleasure, does not make him a resident within the attachment laws, especially if his personal domicile be elsewhere; on the other hand it is not essential to constitute him a resident within those laws that he should come here with the intention to remain here permanently. Within those laws, one who decides to remove to another state, is a non-resident directly he com-

mences his removal and before he gets beyond the limits of the State. (4 Min. Inst., 412; 30 Grat. 718, 720-2; 12 Grat. 440; 10 Grat. 284.)

DOWER

- § 1. Definition
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- § 6. How present value of dower estimated
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 - (1) In general
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- § 8. Assignment of dower
 - (1) Valuation of the land
 - (2) Where dower interest has been sold
 - (3) How dower assigned
- § 9. Widow's rights and duties after assignment of dower
- § 10. Forms of bills and decrees, in assignment of dower

§ 1. Definition.—Dower is an estate for life which a wife has in one-third of her husband's lands (legal or equitable), upon her death, whether there be any child born to them or not. Section 5117 of the Code, as amended by Acts 1922, says: "A widow shall, if her husband die testate (i. e., having made a will), be endowed of one-third, and if he die intestate (i. e., without a will) and without issue of this marriage, or of a former marriage, be endowed of all the real estate whereof her husband, or any other to his use (i. e., equitable or trust estates—see also § 5158), was, at any time during the coverture

(i. e., marriage), seized of an estate of inheritance (i. e., estates capable of being inherited by heirs, as, fee simple, base fee, fee conditional or fee tail—see section 4, below), unless her right to such dower shall have been lawfully barred or relinquished.” This act does not deprive a wife of her dower where there is no will and a child is born. For a similar statute as to the husband, see *Curtesy*.

§ 2. Requisites for dower.—The requisites for dower are the same as for curtesy (see *Curtesy*, section 2), except, (1) dower may be in lands as to which the husband has only a mere right of entry or action (Code, § 5118); and (2) no children born during marriage is required for dower.

§ 3. Title of seisin of husband.—If the deed to the husband is void as to subsequent purchasers and creditors, because unrecorded, or made to defraud creditors, etc., there is no dower as against them, yet there is as to all other persons, and where their joint deed is set aside as fraudulent as between the parties, she still has dower.

As to judgment in ejectment by default or collusion of the husband, the widow is not thereby barred of dower (Code, § 5129).

Where the husband holds only the legal title, without any beneficial interest in himself, as where he is a trustee or mortgagee, there is no dower, of course, for his widow, (and so a wife need not join her husband (the trustee) in a deed of release). This is true also in the case of implied or constructive trusts, as, where the land was paid for by another; or the conveyance has been secured by fraudulent misrepresentations, unless the grantee elects to confirm the transaction; or where before marriage the husband contracts to convey land and does so afterwards, his wife not joining (92 Va. 537; 98 Va., 515, 523). There is no dower in land held by a court of equity to be personal property (see *Real Estate*, section 1, (1)).

The title or seisin may be only for a moment, as, where father and son are killed or die nearly at the same time, the son surviving only a moment longer, the latter's widow has dower in the land inherited from his father; so also, where immediately after receiving a deed, the grantee conveys the property to secure a debt other than the purchase money; but otherwise, if to secure the purchase money pursuant to a

prior understanding to that effect the two conveyances, being regarded as contemporaneous transactions, though the one is subsequent to the other. So where a vendor's lien is reserved, the dower is subject to the lien.

Dower or curtesy may be had in the estate of inheritance of a joint tenant, tenant in common, or co-parcener, the same to be assigned individually with his co-tenants, but a partition may be demanded by either. If a partition is made by court in his lifetime, there is no dower to his widow, whether a party to the suit or not (Code, § 5281).

There is no dower in land purchased with partnership funds for partnership purposes, it being regarded in equity as personalty (see *Real Estate*, section 1, (1)). (1 M's Real Prop., §§ 261-71, 941.)

§ 4. In what estate widow has dower.—

(1) *Generally.*—It must be an estate of inheritance, i. e., an estate capable of being inherited by heirs, as, a fee simple, base fee, fee conditional, or fee tail. A life estate or estate for years is not such estate. (See *Real Estate*, section 2.)

The husband must be seized or entitled to the actual possession and enjoyment of the estate at some time during marriage—the immediate estate. So there is no dower in a remainder or reversion, after a freehold (as, a life estate or a contingent remainder) in another (see *Real Estate*, section 2), until it vests; but otherwise; where the preceding estate is not a freehold, but a leasehold, as an estate for years.

A widow's title dates from the moment of her husband's death—not the time of the assignment. So where a son gets lands by will or descent from his father, dower vesting in the father's widow, if the son dies during the lifetime of the father's widow, the son's widow has no dower in the father's widow's one-third, it not vesting in him during his marriage. But if the son take the land by conveyance (wife not uniting), he is, prior to his father's death, vested with the whole estate, whose seisin cannot be defeated except by the assignment of dower, which dates from the father's death; and upon the son's death, his widow also takes one-third of the whole land (not the two-thirds), which, however, is assigned out of the two-thirds. (1 M's Real Prop., §§ 272-8.)

In case of the exchange of lands by one deed, if a wife

fails to join, she has dower in either tract at her election; but if the exchange is made by mutual conveyances, question if she does not have dower in both tracts being seized of both (1 M's Real Prop., § 292).

For what is, and the kinds of, real estate, subject to dower, see *Real Estate*, section 1, (1); and 1 M's Real Prop., §§ 288-93.

(2) *Equitable estate, and Encumbered land.*—By statute (Code, §§ 5117, 5158), there may be dower in equitable estates, at least express trusts for the benefit of the husband, existing at any time during the marriage.

The statutes do not apply to personality pronounced by a court of equity or by statutory enactment to be land; so there is (as still ruled by the common law) no dower in such cases. But under the statutes, there is dower in land purchased by contract, the owner being regarded as holding the land in trust for the purchaser, even though the trust is not complete at his death by full payment of the purchase money; and also in the equity of redemption (what is left after paying the debt) of mortgages and deeds of trust. Where the mortgage or deed of trust is executed before or after marriage and is not foreclosed in the husband's lifetime, she has dower in the equity of redemption, i. e., one-third of the surplus (100 Va. 337); but if the mortgage, etc., is foreclosed during his lifetime, whether made before or after marriage, there is dower in the surplus (i. e., one-third—100 Va. 600), it being provided generally: "When land is *bona fide* sold in the lifetime of the husband, to satisfy a lien or encumbrance thereon, created by deed in which the wife has united or created before the marriage, or otherwise paramount to the wife, she shall have no right to be endowed in the said land. But if a surplus of the proceeds of sale remain after satisfying the said lien or encumbrance, she shall be entitled to dower in said surplus, and a court of equity having jurisdiction of the case may make such order as may seem to it proper to secure her right." (Code, § 5119). (See, also, section 5, (2), (b), and section 7, (3) below.)

§ 5. Contingent or inchoate right of dower.—This is the right thereto before the death of the husband.

(1) *How creation of contingent right of dower prevented.*—Dower may be prevented by giving to the husband

only a life estate; or to another the immediate freehold during marriage, and the remainder to the husband; or to the husband the immediate inheritance, with the proviso that if he have children the estate shall go to them as purchasers or devisees, not as heirs of the husband; or by interposing an intermediate vested estate of freehold between the immediate freehold of the husband in possession and the husbands' inheritance, as a conveyance or will to husband for life, remainder to B for life, remainder to husband and his heirs; or where the husband, before marriage, conveys to A for life, remainder to B for life, and then buys back A's life estate; or by a conveyance or will to such uses as the husband shall appoint and until appointment to the use of the husband and his heirs, he making the appointment before his death; or by a conveyance to a trustee for the benefit of the husband, with full power in the trustee to manage, sell, mortgage or otherwise dispose of the property and to give receipts for the purchase money, without requiring the signature of the husband or his wife or those claiming under him to any writing disposing thereof. (1 M's Real Prop., §§ 298-302.)

(2) *How contingent dower barred or relinquished after it has attached.*

(a) *Dower barred by dedication, condemnation, superior title, divorce, or adultery.*—Dower, when once attached as a contingent right, cannot be divested by the sole act of the husband, except where he voluntarily dedicates his land to a public use, which is equivalent to condemnation thereof by court proceedings.

Dower is defeated where the grantor re-enters for a breach by the husband of a condition subsequent (see *Real Estate*, section 2); where his land is taken by condemnation proceedings (and she is allowed no compensation for her dower); where sold to satisfy an encumbrance or for taxes, but she has dower, however, in the surplus (see section 4, above); or where he otherwise loses the land by a superior title, as in ejectment, but if the recovery therein be by collusion or default of the husband, dower is not defeated (Code, § 5129).

The effect of divorce upon dower is the same as in the case of curtesy—see *Curtesy*, section 2, (1).

As to desertion, and living in adultery, section 5123 of the Code provides: "If a wife, of her own free will, leave her husband and live in adultery, she shall be barred of her

dower, unless her husband be afterwards reconciled to her, and suffer her to live with him"; and section 5277 makes similar provisions as to either husband or wife as distributee of personal estate—see *Descents and Distributions*. A voluntary separation followed by adultery is a "living in adultery," though she remains not with her paramour continually or be detained by him against her will. Reconciliation and cohabitation—both—are necessary to remove the bar. If the husband first deserts, her subsequent adultery does not bar her dower, in the absence of a divorce. Neither her desertion nor adultery, alone will bar her dower, though his desertion continued until death bars his curtesy (Code, § 5140). (1 M's Real Prop. §§ 304-6.)

(b) *Dower barred by wife's joinder in transfer*.—Joinder with her husband in a conveyance, by express statute (§ 5211), conveys her right of dower, "but no covenant or warranty therein on behalf of the wife" binds her any further, unless expressly so stated as intended to bind her personally. And by another statute as amended by the Revisors (§ 5135), it is provided: "A married woman may, by uniting with her husband in a deed or contract, dispose of her contingent right of dower in her real estate; or, if the husband has previously disposed of his interest in real estate in which she is entitled to a contingent right of dower, she may thereafter, but not before, dispose of her contingent dower in the same by her sole act as if she were unmarried." Thus as long as the husband owns or has an interest in the real estate, as, in the case of mortgages and deeds of trust, she cannot convey her contingent right to any person whomsoever; but if he has conveyed away, or disposed of his interest, by deed or contract, she may dispose of her said right of dower by her conveyance alone. But even then she conveys no estate, only a contingent right or possibility. Her grantee does not hold her dower right in the land, upon the husband's death, but he only has a release or extinguishment of her right. The wife may be compensated for her joinder in a her husband's deed or contract (24 Grat. 443; 2 Rand. 563).

If their joint conveyance is declared void for fraud between the parties, she has dower. If the conveyance is valid as between the parties, but void as to third persons, such as creditors, because unrecorded or made to defraud creditors, her dower is not lost as against the creditors, but only as

against the grantee and those claiming under him; so if, after the creditors are satisfied, a part of the land remains, as to such portion she has no dower. In case of joinder in a mortgage or deed of trust, her dower is released only as against the mortgagee or trustee and those claiming through or under them, and even as to them if the debt be paid by the husband or his personal representative, her dower is restored; and if the land is sold or some one interested pays the debt before sale, she has a dower in the surplus. So where the wife unites in a deed of trust of land subject to a mechanic's lien, upon a sale under the mechanic's lien the purchaser takes subject to her dower. Nor does the wife's mere joinder in a mortgage, without expressly pledging herself personally or her property as security, make her surety for her husband, and she is not entitled to be paid the full value of the dower right she has lost by joining in the mortgage but only one-third of the surplus. (100 Va. 337, 602; 91 Va. 458; 33 Grat. 285.)

Where a wife is a minor or insane, her joinder does not bar dower. Section 6346 of the Code provides how by court proceedings dower or curtesy in such case may be passed, and her rights secured. (1 M's Real Prop., §§ 314-15, 331.) And where the husband is a minor or insane, she may release her dower or convey her estate by joining in the court deed, where his lands are sold and her right secured. (Code, § 5344-5.)

(c) *Jointure (or other property) in lieu of dower.*—Jointure (so-called from its technical origin—a joint estate to both during marriage, with remainder to survivor for life) is property conveyed or willed to the wife in lieu of dower. Section 5120 of the Code, changing nearly every requisite of jointure under the English statutes of uses, provides: "If any estate, real or personal, intended to be in lieu of dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate, or the residue thereof, and every such provision, by deed, or will shall be taken to be intended in lieu of dower, unless the contrary intention plainly appear in such deed or will, or in some other writing signed by the party making the provision."

Under this statute, it is necessary that the provision for the wife, or at least a part of it, should be enjoyed after her husband's death, for it is then she may elect whether to take dower or jointure; if she receives the provision during his

lifetime and spends or wastes it, the dower is not barred (98 Va. 284).

The statute (§ 5121, as amended by Acts 1922) as to her election to waive jointure and demand dower, says: "But if such conveyance or devise were before the marriage, without the assent in writing or during the infancy of the female, or if it were after marriage, in either case, the widow may, at her election, waive such jointure and demand her dower. Such election shall be made within one year after the death of the husband or within one year after the admission of his will to probate where the provision is by will, and shall be made in any court of record in the county or corporation in which the husband resided at the time of his death, or in the clerk's office of which the instrument creating the jointure is recorded, or by a writing recorded in such court, or in the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record under chapter two hundred and eleven; and when she shall elect and receive her dower, the estate so conveyed or devised to her shall cease and determine; provided, however, that if any such conveyance or will is of doubtful import as to the amount or value of the property the widow is to receive thereby or thereunder and a suit in equity is pending wherein the said conveyance or will will be construed in such respect, the court in which said suit is pending shall, within said year, on the application of said widow, if she so desires, enter an order extending the time within which she is to make such election for such additional period beyond such year as will allow the said widow a reasonable time, not exceeding six months, for making such election after a final order shall have been entered in said suit construing such conveyance or will in such respect, either by a trial court or any appellate court to which it may be appealed; and provided further, that said widow may, within such year, have the right to herself institute and maintain any such suit for the proper construction of said conveyance or will in such respect."

Hereunder, the widow may elect between dower and jointure in any case, except where the provision for her is made before marriage and with her written assent, she being 21 at the time.

If her taking dower would interfere with any of the provisions of the deed or will creating the alleged jointure, she

must elect whether she will take under the will, for one cannot claim under and contrary to an instrument at the same time (14 Grat. 540; 76 Va. 117).

A widow's renunciation of her jointure must not disappoint the testator's disposition further than necessary to enforce her right; and therefore the property renounced ought to be applied to indemnify the beneficiaries under the deed or will who are disappointed by her choice (78 Va. 226; 9 Grat. 242; 6 Leigh, 461).

If the widow be a minor or insane, the court will ascertain what will be best for her and then make the choice for her.

When the widow is deprived of her jointure or part thereof, she takes her dower. Section 5122 of the Code says: "If a widow be lawfully deprived of her jointure, or any part thereof, she shall be endowed of so much of the real estate whereof, but for said jointure, she would have been dowable, as is equal in value to that of which she was deprived."

(d) *Wife's agreement to relinquished dower.*—Relinquishment in consideration of marriage is not a bar; but mutual relinquishment of all marital rights in each's property, would seem sufficient (11 Grat. 434; 3 Leigh, 255; 34 W. Va. 142), though questioned by the Prof. Minors.

Section 5135 of the Code (see section 5, (2), (b), above) applies only to a deed and contract to a third person, and not to a deed or contract by the wife to her husband, or for his benefit, and so her contract to him during marriage, releasing her dower to him is void (98 Va. 287-8; 26 Grat. 582-3).

But a settlement of property upon her as compensation for joining in his deed or contract to a third person is valid, if his creditors are not thereby defrauded (24 Grat. 443; 2 Rand. 563). (1 M's Real Prop., §§ 330-1.)

(e) *Dower barred by estoppel.*—While not so at common law, yet in equity, a valid acceptance of other lands, money or other collateral satisfaction in lieu of her dower estops her to claim dower, if she be of age and apprised of her rights (103 Va. 624; 98 Va. 284; 77 Va. 69; 1 M's Real Prop., § 332).

§ 6. *How present value of dower estimated.*—Where the dower has become vested by the husband's death, its present value, or that of an estate by curtesy or other life estate, or an annuity, may be estimated as provided in the following

sections (5131-3 of the Code: "When a party as tenant for life, or by the curtesy, or in dower, is entitled to the annual interest on a sum of money, or is entitled to the use of any estate, or a part thereof, and is willing to accept a gross sum in lieu thereof, or the party liable for such interest, or affected by such claim, has the right to pay a gross sum in lieu thereof, or if the court in any legal proceeding decree a gross sum to be paid in lieu thereof, the sum shall be estimated according to the then value of an annuity of six per cent. on the principal sum during the probable life of such person, according to the following table, showing the present value, on the basis of six per cent. interest, of an annuity of one dollar, payable at the end of every year that a person of a given age may be living, for the ages therein stated:

AGE	PRESENT VALUE	AGE	PRESENT VALUE	AGE	PRESENT VALUE	AGE	PRESENT VALUE
0	\$10.439	26	\$13.368	52	\$10.208	78	\$4.238
1	12.078	27	13.275	53	9.988	79	4.040
2	12.925	28	13.182	54	9.761	80	3.858
3	13.652	29	13.096	55	9.524	81	3.656
4	14.042	30	13.020	56	9.280	82	3.474
5	14.325	31	12.942	57	9.027	83	3.286
6	14.460	32	12.860	58	8.772	84	3.102
7	14.518	33	12.771	59	8.529	85	2.909
8	14.526	34	12.675	60	8.304	86	2.739
9	14.500	35	12.573	61	8.108	87	2.599
10	14.448	36	12.465	62	7.913	88	2.515
11	14.384	37	12.354	63	7.714	89	2.417
12	14.321	38	12.239	64	7.502	90	2.266
13	14.257	39	12.120	65	7.281	91	2.248
14	14.191	40	12.002	66	7.049	92	2.337
15	14.126	41	11.890	67	6.803	93	2.440
16	14.067	42	11.779	68	6.546	94	2.492
17	14.012	43	11.668	69	6.277	95	2.522
18	13.950	44	11.551	70	5.998	96	2.486
19	13.897	45	11.428	71	5.704	97	2.368
20	13.835	46	11.296	72	5.424	98	2.227
21	13.769	47	11.154	73	5.170	99	2.004
22	13.697	48	10.998	74	4.944	100	1.596
23	13.621	49	10.823	75	4.760	101	1.175
24	13.541	50	10.631	76	4.579	102	0.744
25	13.456	51	10.422	77	4.410	103	0.314

(Code, § 5131.)

"Calculate the interest at six per cent. upon the sum to the income which, or upon the value of the property to the use of which, the person is entitled. Multiply this interest by the present value of an annuity of one dollar, as set opposite the person's age in the table, and the product is the gross value of the life estate of such person therein." (§ 5132.)

"Suppose a person whose age is forty-two is tenant for life in the whole of an estate worth \$10,500, the annual interest on that sum, at six per cent., is \$630. The present value of an annuity of one dollar at the age of forty-two, as appears by the table, is \$11,779, which, multiplied by \$630, gives \$7,420.77 as the gross value of such life estate in the premises, or the proceeds thereof; then, suppose a widow whose age is thirty-six is entitled to dower in real estate worth \$12,000, interest on \$4,000, the third part thereof, for one year, is \$240, which, multiplied by \$12.465, the present value of an annuity of one dollar at the age of thirty-six, as appears by the table, gives \$2,991.60, as the gross value of such dower." (§ 5133.)

An estimate of the present value of a contingent right of dower during the marriage is more difficult, involving not only the duration of one life, but also the chances of survival as between husband and wife. Table for this purpose may be seen in 3 Va. Law Reg., 69, etc., and 2 Rob. Reports, 384. These, of course, are modified by health, locality, etc. A partial table of the present value of \$100 worth of estate is as follows, which might be helpful in a rough estimate:

AGE OF THE WIFE	AGE OF THE HUSBAND				
	26	30	34	40	58
18, - - - -	3.99	4.51	5.03	5.99	11.40
22, - - - -	3.77	4.25	4.74	5.69	10.95
26, - - - -	3.53	3.97	4.42	5.35	10.47
30, - - - -	3.23	3.69	4.10	4.99	9.96
44, - - - -	2.34	2.63	2.92	3.54	7.65

§ 7. Widow's rights and duties before assignment of dower.—

(1) *In general.*—Before her dower is assigned her, the widow may assign or release her undivided one-third interest (Code, § 5147), though the interest is not an estate until set apart to her. Though her dower interest, before assignment,

is not an estate, yet she may assign or release her interest before her dower is set apart to her (Code, § 5147). This mere interest may also be subjected in equity to her debts.

(2) *What a widow entitled to until dower is assigned.*—By section 5124 of the Code: "Until her dower is assigned, the widow may hold, occupy, and enjoy the mansion house and curtilage without charge for rent, repairs, taxes, or insurance; and, in the meantime, she shall be entitled to demand of the heirs, devisees, or alienees, or any of them, one-third part of the issues and profits of the other real estate which descended or was devised or passed to them, of which she is dowerable, after deducting the costs of necessary repairs, taxes, and insurance. If she be deprived of such mansion house and curtilage, she may, on complaint of unlawful entry or detainer, recover the possession thereof, with damages for the time she was so deprived; but nothing in this section shall be construed to impair the lien, or delay the enforcement thereof, of the State, city, or county for the taxes assessed upon such property."

The right of the widow to remain in the mansion house (called her "quarantine," in analogy to the forty days' quarantine of the crew of a vessel suspected of disease infection) is forfeited if she marries again. (1 M's Real Prop., § 338.)

By section 6554 of the Code: "The dead victuals (or as much thereof as may be necessary) which, at the death of any person, shall have been laid in for consumption in his family, shall remain for the use of such family, if the same be desired by any member of it, without account thereof being made. Any live stock necessary for the food of the family may be killed for that use before the sale or distribution of the estate, and the same shall not be taken into account by the administrator or executor of said estate."

And also by section 6562: "Upon the death of a householder, leaving a widow, minor children, or daughters who have never married, there shall be vested in them, or such of them as shall then constitute members of the household, absolutely and exempt from sale for funeral expenses, or debts of the decedent, or charges of administration on his estate, such of his property as would, if he were alive and a householder, be exempt under section 6552 from levy or distress for his

debts"—the "poor law" exemption—see *Homestead and Other Exemptions*.

(3) *Priorities as between dower and husband's debts.*—

If the debts, before marriage or afterwards have not been made a lien, her dower is superior. If they have before marriage been made liens of any kind (though not recorded), they have priority, but upon sale she has dower in any surplus (Code, § 5119). If the lien and the marriage were effected the same day, the dower has precedence. If the husband contracted before marriage the debts for his benefit, the widow is entitled, as between her and the heirs or a person taking under the will, to have the liens satisfied out of the personalty, or lands of such persons; but if the debts are not his, but the land came to him already encumbered, the dower is subject to the encumbrance, which means she must keep down the interest on her third. When the debt falls due, she must pay all or else submit to sale; but if she pays the whole she may compel the heirs or other persons interested in the other two-thirds, to contribute *pro rata*.

If the husband's debts after marriage are made liens of any kind, the dower is superior, except in two cases: (1) where the wife unites in giving a mortgage, or deed of trust, and (2) where he gets the land subject to a lien, when, in either case, she has dower only in what is left (see section 4, (2), above), unless the husband in his lifetime, or a purchaser from him under an agreement to assume the encumbrance, pays the debt, but the purchaser at the sale voluntarily paying it does not restore the full dower.

One who, purchasing land, and as a part of the same transaction though subsequently, executes a mortgage or deed of trust thereon to secure the purchase money or a part thereof, is regarded as receiving the land subject to a lien, and she need not unite in executing it. (1 M's Real Prop., §§ 339-40.)

§ 8. *Assignment of dower.*—

(1) *Valuation of the land.*—The widow is entitled to one-third in productive value, not merely one-third in quantity. The value is estimated as at the time of the assignment or recovery; if the land, after the husband's death, rises in value from natural causes, or if the heir improves it, as, by planting crops or building houses, the widow profits by it; but if

the land depreciates in value, she loses; and by statute (Code, §§ 5127-8) this is true as against a purchaser under a decree of court, or a grantee of the husband in his lifetime, as well as heirs or those claiming under a will, or their assigns; but a court of equity will relieve the purchaser at the sale or from the husband from her recovery of dower in kind on the terms of his paying to the widow during her life, lawful interest from the commencement of her suit on one-third of the value, at the husband's death, of the real estate sold, deducting the value of such permanent improvements (if any) then existing as may have been made (after the sale) by the purchaser or his assigns. (1 M's Real Prop., §§ 342-4.)

(2) *Where dower interest has been sold.*—In such case, the purchaser may ask for the assignment, even in a court of law, or the other parties in interest may set apart to him his allotment without suit. (1 M's Real Prop., § 345.)

(3) *How dower assigned.*—By section 5125 of the Code: "Dower may be assigned as at common law; or upon the motion of the heirs, devisees, or alienees, or any of them, the court in which or in the clerk's office of which the will of the husband is admitted to record or administration of his estate is granted or the conveyance of the alienee is recorded, may appoint commissioners, by whom the dower may be assigned, and the assignment, when confirmed by the court shall have the same effect as if made by the heir at common law; but nothing herein contained shall be construed to take away or affect the jurisdiction which courts of chancery now exercise on the subject of dower."

As an assignment of dower passes no estate, but dower is a continuation of the husband's estate; so really no writing is necessary for a voluntary assignment of dower, but it would be very imprudent not to have a written memorial of the transaction; and if made by order of court it must be in writing and recorded (Code, §§ 5125, 5216).

The dower may be assigned by order of court, or by the widow and the other parties in interest. If an heir is a minor, his guardian acts (Code, § 5129), or if he be insane, his next friend. If there are several heirs or parties taking under a will (who are joint tenants), one holding a freehold estate in the land may assign the dower to the widow; but otherwise where they are tenants in common or co-parceners, who each is

seized of an undivided share only (see *Real Estate*, section 2, for definition of such tenants). The widow's acceptance is necessary to a voluntary assignment of dower. If the widow is ousted by a superior title, she recovers in value a third of the remaining two-thirds, as at the time of assignment.

Dower must not be assigned in other lands, though if by agreement of all parties she takes other lands or money in lieu of dower, equity (though not law) will repel any subsequent claim of dower on her part.

In making the assignment, regard is to be had mutually to the rights of all persons concerned; as, where the husband has sold some of the land, her dower should be assigned out of his other lands, if no injustice be thereby done the widow; and likewise where there are several purchasers from him, the several trusts, so far as possible, should be subjected to her dower in the inverse order of the conveyances, taking the unsold land first. This is the rule where encumbered land is sold in parcels (Code, § 6476).

Dower is usually assigned by metes and bounds, though this may be dispensed with by mutual agreement. For example, if the property cannot be divided, as in case of a mill, mine, etc., she may be endowed with a third of the toll, rents and profits, etc.; and where the husband has only an undivided interest, she may be assigned her proportionate share of the profits, etc., or either tenant may demand a partition. But in no case can the court, without her consent, assign her a gross sum of money in one payment in satisfaction of her dower—at least if it be possible to assign the dower otherwise (see section 6, above). This is computed according to table in section 6, above.

As to recovery of dower and damages for its being withheld, by statute (§§ 5126-7, 5480) this may be done by ejectment, or a bill in equity, the court appointing commissioners to assign the dower; and at law or in equity the widow is allowed damages either as against a purchaser from her husband in his lifetime or under a decree of court, or against his heirs or persons taking the land under his will, or other assigns,—as against the purchaser, from the commencement of the suit, and as against the others, for such time after the husband's death as they have withheld the dower, not over 5 years before

the suit is commenced, and in either case to the time of the recovery; and if after suit is brought the widow or the tenant die before such recovery of damages, the same may be recovered by her executor or administrator against his.

By section 5124, before dower is assigned, "if she be deprived of the mansion house and curtilage, she may, on complaint of unlawful detainer, recover the possession thereof, with damages, for the time she was so deprived." (1 M's Real Prop., § 355.

§ 9. Widow's rights and duties after assignment of dower.—Upon assignment of dower, but dating from the death of her husband, she becomes a tenant of a freehold for life, with the same rights and duties in general as divolve upon any other tenant for life—see *Real Estate*, section 4. So she must pay one-third of the annual interest upon liens or encumbrances which are superior to her dower, or contribute her share in paying off such encumbrance falling due during her lifetime, etc.—see section 7, (3), above; and 1 M's Real Prop., § 355.

By section 5130 of the Code, crops growing on a widow's dower land at her death may be disposed of by her will, and shall go to her executor or administrator like growing crops on any other life estate.

If a widow receives dower or jointure, she cannot also have a homestead exemption in lands; and if she and the minor children set apart an exemption in personal estate, the value of her dower or jointure must be deducted therefrom, but the rights of minor children must not thereby be impaired. (Code, §§ 6538, 6541.)

§ 10. Forms of bills and decrees, in assignment of dower.—See Hurst's Forms, Nos. 74 and 75, and 211-12.

DRAINAGE AND POLLUTION OF STREAMS

See Easements; Real Estate

§ 1. **Drainage.**—Since 1910, we have had an extensive drainage act for the establishment by the courts of drainage districts, which see (Code, §§ 1737-81, and Acts 1920, p. 607, amending §§ 1738, 1749-50, 1771, 1774, 1781.)

For procedure to drain through another's land, see Code, §§ 5293-7.

§ 2. **Pollution of streams.**—See Code, §§ 1782-96 and Acts 1918, p. 425.

DUE-BILL

§ 1. **Definition and nature.**—A "due bill" is an acknowledgment of a debt in writing as now due and payable to the creditor direct, and not to his order like a negotiable note. It may be assigned but not by mere endorsement.

§ 2. **Forms of "Due-Bills."**

No. 1. Due (or *I owe*) A. P. \$1.00., Aug., 20, 1921. S. N.

No. 2. Upon settlement of accounts, this day, with A. P. I acknowledge the sum of \$100 to be due and owing to him by me. This August 20, 1921. S. N.

DUELLING

1. **Offense.**—See Code §§ 4416-25.

§ 2. **Antiduelling oath.**—See Code, §§ 270-1.

§ 3. **Disqualified to vote or hold office.**—See Va. Const. § 23; Code, §§ 93, 289.

§ 4. **Legislature may remove disability.**—See Va. Const., § 57.

DUE PROCESS OF LAW

- § 1. Definition
- § 2. Constitutional provisions
- § 3. Illustrations

§ 1. Definition.—"Due process of law" is equivalent to "law of the land" or "due course of law", and requires that a person shall have reasonable notice, and an opportunity to be heard before an impartial tribunal of competent jurisdiction, and that the proceedings therein shall be according to some recognized and accustomed mode of procedure, between the proper parties, before an order or decree can be made affecting one's right of person or property. (92 Va. 461; 93 Va. 919; 96 Va. 272; 109 Va. 565.)

§ 2. Constitutional provisions.—The 5th Amendment to the U. S. Constitution, providing that no person shall be "deprived of life, liberty, or property, without due process of law," is applicable alone to the Federal government as a restraint upon its authority (20 Grat. 165); but the 14th amendment is an express restraint and limitation upon the powers of the States, it providing that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law" (this latter class forbidding class legislation). Section 8 of the Virginia Constitution, as to criminal cases, says that "no man shall be deprived of his life ("life" was added by the Constitution of 1902) or liberty, except by the law of the land or the judgment of his peers"; and the Constitution of 1902 inserts for the first time, as to civil matters, "that no person shall be deprived of his property without due process of law."

Until the 14th Amendment as to due process, the only limitation upon the power of a State with respect to retrospective laws was that they should not impair the obligation of contracts, nor partake of the nature of *ex post facto* laws (see *Statutes*). There is no express inhibition in the State Constitution as to retrospective laws. (105 Va. 242, 255.)

§ 3. Illustrations.—A statute may in some cases authorize an arrest without a warrant. A summary arrest and imprisonment under the statute (§ 2395) for the collection of

taxes does not violate the right of personal liberty. (20 Grat. 165; 103 Va. 870; 110 Va. 892-3; 122 Va. 920.)

A statute making railroad companies liable for damage by fire along their right of way, though without negligence, or requiring a railroad to fence their roadbeds, is constitutional; but otherwise a statute requiring an unjust and unreasonable reduction of tolls of a turnpike company (165 U. S. 1; 115 U. S. 512; 164 U. S. 578; 2 Va. Law Reg. 813, 816, 861-2.) Our statute (§§ 2451-2), providing for forfeiture of lands for failure to have the same entered in the land books, after notice in writing by the commissioner, was held by our courts constitutional—that the statute was self-executing without the necessity of any inquisition or judicial procedure of any kind (10 Grat. 400, 405, 445; 15 Grat. 190; 17 Grat. 221; 18 Grat. 100; 96 Va. 231); but these decisions were questioned by the U. S. Supreme Court (171 U. S. 405); and so the Revisors of the Code 1919, to meet this objection, have provided for a declaration of forfeiture, by the court, after ten days' notice.

The statute (§ 2292) providing for reinstatement and assessment by commissioners, of land improperly dropped from the land books, is not unconstitutional, as provision is made (§§ 2385-6) for review of action of commissioner. (97 Va. 397.)

The statute (§ 2488) as to lands sold for delinquent taxes, cutting off all defenses against the purchaser, except that the taxes were not properly chargeable or have been paid, is a valid exercise of the legislative power, and due process of law. (97 Va. 536.)

The "stay law," passed after the Civil War, suspending the running of the statute of limitations, is constitutional. (26 Grat. 72; 27 Grat. 587; 4 Va. Law Reg. 330.)

Assessment of taxes by a city or town without opportunity to be heard, or to correct an erroneous assessment, is taking property without due process of law (92 Va. 561; 96 Va. 272; 97 Va. 728); the statute (§ 3073) now has a provision for notice and a regular course of procedure. See, also, *Cities and Towns*.

An appeal or writ of error is not an inalienable right, nor any part of due process. (103 Va. 870.)

A municipality cannot deprive an owner of a dead animal, of his property therein, before the same becomes and is adjudged a nuisance. (103 Va. 774.)

Prior to the enactment of Acts 1908, p. 536, (Code, §§ 5361 & seq.), providing for the administration of the estate of a person presumed dead by reason of seven years' absence, it was held that to administer the estate of such an one, without notice, was deprivation of property without due process, under the 14th Amendment. (104 Va. 826, 828-30.)

A judgment *in personam* (against the person) against a non-resident upon substituted process is void under the 14th Amendment. (106 Va. 61.)

The State Corporation Commission, acting in its judicial capacity, must give notice of its proceedings. (106 Va. 265.)

The statute (§ 6063) authorizing the service of process on a domestic corporation by publication, is due process of law. (124 Va. 465.)

The drainage law (§§ 1737 & seq.) provides for due process. (124 Va. 71.)

EASEMENTS

See *Adjoining Landowners; Cities and Towns; License (on Lands); Roads, Bridges, etc.*

- § 1. Nature of easements
- § 2. Modes of acquiring easements
 - (1) By natural right,
 - (2) By express grant, deed, or covenant
 - (3) By express reservation or exception
 - (4) By implied grant
 - (5) By implied reservation
 - (6) By prescription
 - (7) By estoppel
- § 3. Modes of extinguishing easements
- § 4. Instances of easements, and special principles applicable thereto
 - (1) Private ways
 - (2) Support of land
 - (3) Support of buildings
 - (4) Party wall

- (5) Division fences
- (6) Light, air, and prospect
- (7) Drainage of surface water
- (8) Pews in churches, and cemetery rights

§ 1. Nature of easements.—An easement is a right (variously acquired—section 2, below) on the part of one person either, (1) to use the land of another (the “servient” tract, the land to which the right is annexed being called the “dominant” tract) in a particular manner and for a particular purpose, as, ways, support of buildings, party walls, division fences, light, air and prospect, drainage, pews and cemetery rights; or (2) to compel the owner of the servient tract to refrain from certain uses of his own land, the rights in either case not be inconsistent with a general ownership in the servient tract. An easement differs from a license (see *License (on Lands)*, section 1), in that a license is not real estate or any interest therein, but a mere authority, usually revocable and non-transferable, to do certain acts, as, to hunt upon another’s lands; while an easement is an interest in land, usually irrevocable and freely transferable in connection with the land. (1 M’s Real Prop., §§ 92, 97, 118.)

§ 2. Modes of acquiring easements.—They may be acquired:

(1) *By natural right*, without any grant, etc., as the right of support, natural drainage, etc.

(2) *By express grant, deed or covenant*, which must be under seal, though a contract therefor not under seal will be treated as an equitable easement, in a court of equity. If granted in general terms, without specifying the mode of enjoyment, it may be used in any manner and for any purpose reasonably within the terms of the grant, or reasonably necessary; as, an “alley passway” covers its use for light and air, and its non-use as a passway is no abandonment of it (105 Va. 519, 525).

(3) *By express reservation or exception.*—The conveyance need be signed only by the grantor.

(4) *By implied grant.*—A grant of land carries with it by implication, as incident thereto, everything reasonably necessary to the enjoyment of the thing granted in the power of the grantor to bestow (98 Va. 668). An implied easement

from necessity or by necessary inference, is where the property could not otherwise be used by the grantee, or be used for the purpose intended; as, where the land is either entirely surrounded by the grantor's lands, or his and a stranger's lands, the grantee has a way out over the grantee's land, by necessity—a subjective necessity of inference that the grantor so intended, rather than by objective necessity to make the land profitable and useful; if the land granted is entirely surrounded by a stranger's, no right of way out is implied by necessity. To establish a way by necessity, the dominant and servient lands must have sometime belonged to the same person. The kind of way and the sort and quantity of traffic over it depends on the condition and mode of use at the time of the grant of the dominant estate. If there be another mode of access to the land, though much less convenient, or more expensive to develop, no easement by necessity, it seems, can be claimed.

Where one is accustomed to utilize a part of his land for the benefit of another, he thereby creates a relation between the two parts called a *quasi* easement; and if he convey the *quasi* dominant tract, retaining the *quasi* servient tract, the conveyance of the former carries with it the right to the continued use of the servient tract; provided (at least where the servient tract comes into another's possession) the *quasi* easement is apparent, continuous, and reasonably necessary to the enjoyment of the dominant tract (23 Grat. 6, 7, 258 76 Va. 304· 98 Va. 668; 102 Va. 148). There may be successive or simultaneous transfers of the two tracts. (1 M's Real Prop., §§ 102-4.)

(5) *By implied reservation.*—An easement by implied reservation, unlike an implied grant (section (4), above), rests, it seems upon the very opposite presumption that the parties intended that the grantor should retain something instead of passing it with the land and also to some extent should derogate from his own grant. This reservation must be based on public policy which intends lands to be useful and beneficial to the community. So where lands are conveyed leaving a surrounded central building or tract surrounded on all sides by his or his and another's lands, the grantor has a reservation of an easement by necessary intendment over the lands con-

veyed. But an easement is not impliedly reserved by the grantor in case of the severance of the ownership of two tracts by the transfer of the *quasi* servient tract, the grantor retaining the *quasi* dominant tract, as is the case of an easement impliedly granted to grantee; except where the easement is strictly and obviously necessary; and except also in the case of reciprocal *quasi* easements, which generally consist of the mutual support of two buildings by one another, as, where one erects two buildings (mutually supporting each other) on two adjacent lots, and then conveys one and retains the other, the easement of support is impliedly reserved by the grantor, in consideration of the support impliedly granted to the grantee, each being a *quasi* dominant as well as *quasi* servient tenement. (1 M's Real Prop., §§ 105-7.)

(7) *By estoppel*.—Where the grantor actually or conbased upon the presumption of a grant, arising after long, continued, adverse, uninterrupted, notorious, exclusive enjoyment of a right in the land of another, under a claim of title, for twenty years. The extent and mode of enjoyment of an easement by prescription depends upon the extent of the user and the customary mode of enjoyment thereof, during said time. (1 M's Real Prop., § 108.) See, also, *Adversary Possession*.

(7) *By estoppel*.—Where the grantor actually or constructively represents the existence of an easement appurtenant to the land sold to be enjoyed in land not sold, the grantor is estopped to deny the easement; as, where the grantor describes the land sold as on a street described as running through his unsold land, he is, as against his vendee (though not necessarily as against the public or third persons), stopped to deny the existence of such a street, and the grantee has a right of way along the route of the supposed street. So, likewise, a right of way in favor of the grantee, or an easement of light and air, may be created by a description in a deed referring to a plat by which adjacent land of the grantor is appropriated to use as a street or a park. The result is the same if the grantor subsequently acquires the servient lands. (1 M's Real Prop., § 109.)

§ 3. Modes of extinguishing easements.—Easements once created may be extinguished:

(1) By a cessation of the purposes for which it was created, to determine which you look to the terms of the grant, in case of an express easement, or, if implied, to the circumstances from which the implication arises;

(2) By express release under seal (Code, §§ 5141, 5147);

(3) By implied release or abandonment,—not by a mere non-use, however long, but in addition to non-use, acts of the owner of dominant tract, showing an intent to abandon permanently the use of the servient land, or adverse acts of the owner of the servient tract for 20 years, showing an intent to obstruct the dominant owner's enjoyment of the easement;

(4) By change of condition of the dominant tract, involving an increased use of the servient land, which depends, in case of an express easement, upon the language used; but in case of an implied easement, upon the needs of the dominant land at the time the easement arises, and in either case, any subsequent change in the dominant tract that necessarily and unavoidably involves an increased use of the servient tract, will extinguish the easement, as also in case of an easement by prescription, if the increased use is inseparable from the former use;

(5) By union of dominant and servient tracts, in the same owner in fee simple or by the same sort of title; but in the case of an estate for life or for years, the easement is only suspended for that period, when it again revives; and where one title is legal and the other legal or equitable, the easement is not extinguished, as it is not where the interest in one of the tracts is undivided, as where he is a joint tenant or a tenant in common;

(6) By adverse acts of the servient owner coupled with the non-use of the easement (even for less than 20 years—but see 98 Va. 668; 105 Va. 525; 107 Va. 601), or by such adverse acts alone for 20 years, obstructing the dominant owners enjoyment and showing an intent to deprive him of the easement, if such acts constitute a legal interference and give rise to a right of action (105 Va. 525; 107 Va. 601), or by acts permanently obstructing the easement (as, where buildings are erected, etc.), under the license or authority of the owner of the easement;

(7) By transfer of servient tract to a purchaser without

either actual notice, as where the use is open or visible, or is constructive notice by recordation of the express grant or reservation, as in the case of light, air, or prospect over a vacant lot. (1 M's Real Prop., §§ 111-17.)

§ 4. Instances of easements, and special principles applicable thereto.—The general principles of easements are given in sections 1 to 3, above. Here we enumerate several kinds and give some of the distinctive principles governing them. The several kinds of easements are:

(1) *Private ways*, as, a foot way, drive way, or cart way (for any wheel vehicle. A cart way includes all the others and a drive way includes a foot way. It is the duty of the grantee of a way to repair it. If the grantor agrees to repair and does not, the owner of the easement may go upon the adjacent lands of the servient owner whenever the way becomes impassable; but not so where it is his own duty to repair. (1 M's Real Prop., §§ 119-21.)

(2) *Support of land*.—Every landowner has a natural right to the support of his land by adjacent (side) and subjacent (underneath) land, and he is entitled to damages for its infringement (even by a city—88 Va. 992), by excavating or improving the servient land, or otherwise. Artificial support suffices, if efficient. The question of subjacent support arises where the surface belongs to one and the minerals to another, and the same law applies as in case of lateral support. If the owner is guilty of negligence, and excavates without due care and warning, and buildings fall or are weakened thereby, he is liable, regardless of any easement of support. (1 M's Real Prop., § 122.)

(3) *Support of buildings*.—This right of support for the added weight of buildings or buildings by buildings, is not a natural right, but a right by express grant or reservation; but if the land, by excavation, would have fallen any way, even without the building thereon, the owner may recover for the building and the land. (1 M's Real Prop., § 123.)

(4) *Party wall*.—This may occur either where the wall is the property and entirely upon the lands of one of the owners, but by grant or prescription is subject to an easement of support for beams, rafters, etc., by the owner of the adjacent house and a right by him to have it maintained as a party wall;

or where the wall is built partly on the land of each, who owns his half of the wall, but with reciprocal and mutual easements of support, etc. If these easements do not exist, the wall is mere property, owned either by one or by both in common. Apart from statute (which we do not have) or agreement, one cannot build a wall partly on another's land, and, if he does so, he cannot compel him to contribute to the expense of its erection or maintenance, though the other may use it as it has become a part of his land by its erection thereon without his consent; but an agreement to contribute is sometimes presumed from acquiescence, knowing the builder expects to be repaid. (1 M's Real Prop., § 126.)

(5) *Division fences*.—At common law, one landowner did not have to assist another to build or maintain a division fence, in the absence of an agreement, express or implied; but by statute (§ 3555, etc.) adjoining landowners are compelled to contribute to the erection and maintenance of division fences. See *Fences*.

(6) *Light, air, and prospect*.—While one has no natural right to either, and cannot object because he has been cut off from either by the erection of buildings, even though this be done maliciously and for the sole purpose of injuring or annoying him, yet as to such air as he does get he has a natural right to get it reasonably pure, and free from pollution by the use made of the adjacent land, as, by the smoke, odors, dust, or vapors of railroad trains, factories, etc., unless he has released such right by grant or abandonment. But a landowner may acquire the easement by express grant or its equivalent, but not by implied grant or reservation, nor by prescription or long usage, so the English doctrine of "ancient lights" is not the law in this country or in Virginia. As to prospect or view, it "is probable," says Prof. Raleigh C. Minor, "that where the right to the continued enjoyment of a fine prospect has been expressly granted, over a vacant lot, the erection of a building thereon or other obstruction thereto would be actionable." (1 M's Real Prop., § 127.)

(7) *Drainage of surface water*.—As to rights in respect to flowing streams, which are not easements, see *Real Estate*, section 1, (7), (A). But there may be an easement as to surface water collected from rain, snow, and the like, and not flowing in natural or defined channels, either to have it drain

on another's land, or, on the other hand, to obstruct such drainage. A lower landowner has no natural right to the water, and so cannot complain if it is cut off. Neither can the upper owner complain if he obstructs its flow and throws it back on him. But if the drainage is in a natural and defined channel along which it has been accustomed to drain the lower owner cannot obstruct the flow. If, however, the flow is sided by ditches or other artificial means so as to discharge the water in volume upon the lower lands, the upper owner is guilty of a trespass. Where the flow is in no defined channel, either natural or artificial, the surface water is regarded as a common enemy, and each landowner may rid his land of it as best he can, without regard to the rights of others. An upper owner, however, has no right to pollute water flowing or draining upon his neighbor's land. (1 M's Real Prop., §128.)

The easement of drip from a building upon another's land is not a natural right, but one that must be acquired by grant or prescription or 20 years' usage. But one using the drip to supply his cistern or for other purpose, though used for 20 years, has no easement therein, because the use is not adverse, and the house-owner may by re-roofing or guttering stop the drip entirely. (1 M's Real Prop., § 129.)

See, also, *Drainage, etc.*

(8) *Pews in churches, and cemetery rights.*—It seems the right to a pew in a church (and also to a tomb or vault in a cemetery) is an easement, and therefore real estate. The owner's right is only to occupy (so long as the church exists), not to decorate according to fancy, nor to tear down. Likewise as to the owner of a burial lot in a cemetery, while he does not own the land, yet his right is real estate. No deed is necessary. He enjoys the easement according to terms agreed upon with the rightful owner and the terms of the original dedication of the cemetery, and the charter and by-laws of the cemetery company. The soil even may be sold in fee, discharged of all easements, if the dead be properly and lawfully removed. (1 M's Real Prop., § 130.)

EDUCATION

- § 1. Education provided by the State
- § 2. Officers and their duties
 - (1) State Board of Education
 - (2) Superintendent of Public Instruction
 - (3) State Board of Examiners, and school inspectors
 - (4) Division superintendents
 - (5) School trustee electoral board abolished
 - (6) County school board
 - (7) District school trustees abolished
- § 3. The teacher
- § 4. The pupil
- § 5. Funds for the school system
- § 6. Regulations of the school system

§ 1. Education provided by the State.—Though a moral and religious, yet it is not a legal duty of parents to educate their children. But the State, recognizing that general education tends to preserve the peace and order, to improve the political condition, to promote the physical comfort and the material prosperity of society, to augment the productiveness and the market value of the lands of a community—undertook in 1870 (acting under the Underwood constitution of 1869), the free and public education of her children from the tiny tot on through a four-years' high school course, with some assistance by the way of free tuition in her higher State-aided institutions.

§ 2. Officers and their duties.—The school system is administered by:

(1) *A State Board of Education.*—This board is composed of the Governor, Attorney-General, Superintendent of Public Instruction (who is president of the board), and three experienced educators (elected by the Senate quadrennially from the faculties of the State-aided institutions), two division superintendents, (one from a county and one from a city) selected by the rest of the board, but these latter to have no part in the appointment of school officials; who divides the State into divisions and appoints division superintendents, prescribe their duties, and those of the Superintendent of Public Instruction, adopts by-laws and promulgates regulations for the management, conduct, and multiplication of the schools, provides for the examination of teachers, appoints inspectors

(upon nomination of the State Superintendent) and fix their compensation, selects textbooks and educational appliances, approves plans of the Superintendent of Public Instruction as to summer normal schools, audits accounts, issues warrants, decides appeals, orders the sense of voters to be taken in certain cases, invests the capital and unappropriated income of the Literary Fund, etc., audits all claims paid out of said fund, approves apportionment of school funds, fixes the contingent expenses of the State Superintendent, punishes division superintendents, appoints board of directors of the State Library, except Law Library, assists in the introduction and establishment of industrial, agricultural, household arts, and commercial education, gives general observation and direction to the school system, reports to the General Assembly, and performs such other duties as may be specially provided by law (Code §§ 594-604; Acts 1920, p. 680; §§ 607-20, and Acts 1922, amending act as to textbooks, and repealing § 611.) For certain other duties of this board, see "Education" sub-division "State Board of Education," the index to Code 1919.

(2) *LA Superintendent of Public Instruction.*—He is elected by the people on Tuesday after the first Monday in November, in every fourth year after 1921; he shall be an experienced educator; his salary is \$3,500, with an allowance for traveling expenses; he is a member and ex-officio president of the State Board, and ex-officio a member of all the boards of State institutions; his duties are prescribed by the State Board (Code, §§ 621-2, 3442).

For various other duties of the State Superintendent, see "Education", sub-division "Superintendent of Public Instruction," in index to Code 1919.

(3) *A State Board of Examiners, and School Inspectors.*—The former are chosen by the State Board, the latter upon nomination of the State Superintendent, for the examination of teachers, and the inspection of schools, their duties, compensation and expenses to be fixed by the State Board and paid as other expenses of the board's are paid (§ 610).

(4) *Division superintendents.*—One for each school division is appointed by the State Board and confirmed by the Senate, for four years, every fourth year after 1921, who cannot be a Federal (but see § 291, amended by Acts 1920, p. 18),

State or county officer, nor a deputy thereof, nor a supervisor, except a fourth-class postmaster or a notary public; he must hold or have held the equivalent of a first-grade certificate, or have been a division superintendent, or a teacher for such a number of years as the board may designate (Code, § 604, as amended by Acts 1920, p. 640, and §§ 624-5, 627-8). The State Board fixes his salary, which is payable monthly, one-half out of the State school fund, and one-half out the general fund of the county, city, or town. The statute provides a minimum salary of \$1,600 per year for full time, if the school population is not less than 3,000; or if less population, \$1,000, or in discretion of the State Board for part time, \$750. In small town or city divisions he may, by permission of the State Board, be a school principal or do other related school work, when his salary is not over one-half of the established minimum of \$1,600. Where the population is over 3,000, he receives an additional \$10 per each 100 (or major fraction thereof) in excess thereof; except where all the schools in the county or city are run less than six months in each year, the salary is not more than 20 per cent. greater than prior to the passage of this act, 1920. (Prior to this act, the salary was \$40 per every 1,000 population up to 10,000, and \$25 for every thousand in excess up to 30,000 but not less than \$450 in any case.) The local county or city school board may supplement the above salary, and provide for his traveling and office expenses, subject to the approval of the State Board. (Code, § 626, as amended by Acts 1920, p. 494.)

The division superintendent is a member of the school trustee electoral board (Code, § 629); and also the president of the county school board (§ 639); may administer the oath of office to a school trustee (§ 638); performs certain duties as to school census (§§ 653-5, as amended by Acts 1920, p. 72), and the estimate of expenses for running schools next year (§ 1646), and the apportionment of school funds (§ 656); settles appeals from the district boards (§ 666); numbers and names the school districts (§ 667); passes on and approves of plans for school houses (§ 673-6 and Acts 1922, amending § 675); approves of a teacher's certificate (§ 688); makes regulations for meeting of teachers (§ 694); nominates pupils for William and Mary College, and selects State students for

Virginia Normal and Industrial Institute (§§ 928, 953-4); perform certain duties as to attendance of pupils from adjoining districts (§§ 719-20), issue of school bonds (§§ 769, 773), school libraries (§ 755); he is not to be interested in school contracts (§§ 682-3; is subject to a penalty for malfeasance or neglect of duty (§§ 686-7); makes reports (§§ 727-9), and sees that the annual statement of school boards is posted and published (§ 750).

For division superintendents in cities or towns constituting a separate school district, see Code, §§ 774-86.

(5) *School trustee electoral board abolished.*—See (6). below.

(6) *County school board.*—By Acts 1922, p. —, school trustee electoral boards and district school trustees are abolished, and the "county school board" is made the unit of operation. The title of the act is "An act to create county school boards; to prescribe the powers, duties, obligations and compensation of such boards; to provide that, in counties, the county school board shall be the unit of operation of the public free school system; and to abolish district school boards in counties, school trustee electoral board in counties, and county school boards as they may exist on September 1, 1922."

One school trustee, resident in the district, is elected in each magisterial district (who must not be a Federal, State, or county officer or supervisor, except 4th class postmaster, superintendent of the poor, commissioner in chancery, commissioner of accounts, registrars of vital statistics, and notary public), and these constitute the county school board, with all the duties and obligations of the several district school boards, at present, among which are the following as at present:

The duty of the district school board is to explain, enforce, and observe the school laws, and make rules for the government of the schools and regulating the conduct of pupils going to and returning from school, and to employ teachers, from a list of eligibles furnished by the division superintendent, and to dismiss them when delinquent, inefficient or in any wise unworthy of the position, but the teacher must have a proper certificate and must not be a brother, sister, wife, son, or daughter of any member of the board (Code, § 659, as amended by Acts 1920, p. 600, and § 666); to suspend or expel pupils

when the prosperity and efficiency of the school make it necessary; to provide free text books for poor children; to see that the school census is taken (§§ 660, 662, 725); to call meetings of the people, prepare estimates of amount of money needed in the district for next year, and provide suitable school houses, furniture, and appliances (§ 661) and sell or exchange the same (§ 649), to visit the schools, provide pay for the teachers, examine all claims against the district, and issue warrants therefor (§ 662); to establish all day, part time, continuation, or evening classes (§ 663); make appropriations to non-sectarian schools of manual, industrial, or technical training, or other school owned or controlled by the the county, city, town or school district, or boards; to provide for such training or other special branches in any public school (§ 664); to provide flags for school buildings in certain cases (§§ 678-9; to perform such other duties as may be prescribed by the State Board of Education, or specially provided by law (§ 665); and to make annual reports (§ 664). They may execute deeds for school property (§ 649); permit use of school houses for other purposes (§ 677); provide for the consolidation of schools and transportation of pupils, establish joint schools, high schools, attendance from adjoining district, or State night schools (§§ 700-3, 719-21; Acts 1920, p. 58), must not have interest in contract, nor purchase school warrants at a discount (§§ 682-4); and are liable for wrongful employment of teachers (§ 659), or for malfeasance or neglect of duty (§ 686-7).

The county school board qualifies as other county officers. They organize by electing a chairman and appointing a clerk. If an even number the division superintendent casts the vote breaking a tie, though he is not a member of the board. The board, on or before April 1st, each year, with the advice of the superintendent, prepares a detailed estimate of the money needed for the next scholastic year, including overhead charges, instruction, operation, maintenance, auxiliary agencies, miscellaneous, including treasurer's commission, and for permanent capitalization. On the basis of this estimate, they request the board of supervisors to fix the school levy; if they refuse, the school board may by resolution ask the judge to order an election on the question during June.

They hold all school property. The board may provide

a *per diem* of \$5 for attendance, but for not more than 20 days. The board must publish an annual statement of receipts and disbursements.

They must make a settlement with the county treasurer, not later than July 15th of each year.

They appoint agents recommended by the superintendent, to take the census; provide for the consolidation of schools and transportation of pupils; provide for the use of school houses out of school hours, during the school term, or in vacation for any legal assembly, and may adopt any rules and regulations necessary to protect school property when so used. They may permit school houses to be used as voting places.

The board may take steps to have land condemned for school house site.

They must, by visitation or otherwise, inform themselves fully as possible of the conduct of the schools; provide for the pay of teachers and other officers; for indigent or poor children; for repairs to school properties; examine claims against the board when approved; order the same to be paid; pay all salaries and other claims by warrant on the county treasurer; establish all day, part time, or continuation, or evening classes giving industrial education, agriculture, household arts or commercial training.

They must on or before August 1st make a report covering the work of the schools for the year ending the preceding June 30th.

They must see that the school laws are properly explained and enforced; make local regulations for the conduct of the schools and for the proper discipline of students; employ teachers and place them in appropriate schools, on recommendation of the superintendent, and dismiss teachers when delinquent, inefficient, or otherwise unworthy. They must not (under penalty of personal liability to refund to the school funds and money paid in violation hereof), employ a teacher who does not hold a certificate in full force.

The county board is authorized to appoint a local school committee (without compensation) of not over 3 members for each school house, to advise members of the board as to matters pertaining to the local school, and to co-operate with

the board as to the care of school property and for the successful operation of the school. (Acts 1922. p—.)

§ 3. The teacher.—Though not designated as such he is a kind of *quasi-officer* of the school system. Having a proper certificate obtained upon examination before the State Board of Examiners, he is employed by the district board from a list of eligibles furnished by the division superintendent and contract made with him; which board may dismiss him, if "delinquent, inefficient, or in anywise unworthy of the position," subject to appeal to the county board (Code, §§ 610; 659, as amended by Acts 1920, p. 600; § 690); he may suspend pupils until the case is decided by the district board (§ 691); he shall teach in the grammar school, orthography, reading, writing, arithmetic, grammar, physiology and hygiene, civil government, drawing, history of the United States, history of Virginia, and health instruction and physical training, with at least 30 minutes each month on the prevention of accidents, and not less than one hour each month in the prevention of fires; and provision shall be made "for moral education in the public schools to be extended throughout the entire course," by means of "reading books and text books inculcating the virtues of a pure and noble life," the text books to be selected by the State Board; and provision is made for employment of school nurses, physicians, physical directors, and a supervisor of physical education (Code, § 702, as amended by Acts 1922; Acts 1920, p. 495); he shall test the sight and hearing of pupils (§ 724); see that they are vaccinated and exclude any having a contagious disease (§ 1529); he must not be interested in any school contract (§§ 682-3); and may be punished for malfeasance or neglect of duty (§§ 686-7). As to graduates of William and Mary, State Normal Schools, and Virginia Normal and Industrial Institute, see §§ 937, 845: 954.

§ 4. The pupil.—In the midst and as the centre and object of the whole system, is the child, who must be between 7 and 20 years, residing in the district, with provision for children of adjoining or other districts or state, and indigent children, and separate schools for white and colored children; persons between 20 and 25 years may be admitted by the district board upon the payment of tuition prescribed by the

State Board; and night schools may be established for pupils regardless of age (Code, §§ 706, 719-21).

Pupils are not to be transported more than 5 miles, or 7 miles if the roads are macadamized, or 10 miles if by motor vehicle (§ 612).

For statute as to compulsory education of children between 7 and 16 years during the session, see Acts 1922 p. —, repealing act 1918, and the act 1908, referred to in § 722 of Code, (§ 722 being now repealed—Acts 1920, p. 74).

For suspension and expulsion and other provisions as to pupils, see section (7) and (8), above.

§ 5. Funds for the School system.—They are, (1) a fixed Literary Fund, whose annual income alone is to be expended, and (2) annual funds derived from State, county, and district taxes, with donations made thereto, and certain penalties and forfeitures, and money appropriated by Congress under the Forest Reserve Act (Code, §§ 603, 614-15, 687, 708-10, 138-53, 757-64, 2575, 2641, 4232).

§ 6. Regulations of the school system.—Some of these are contained in the Constitution (§§ 129-42, 173, 183), some are statutory, while others are prescribed by the State Board of Education (write the Superintendent of Public Instruction for a pamphlet containing them).

For the various statutory provisions as to education and schools, see the following sections: Funds for education from Glebe lands and church property and from gifts, devises and bequests—§§ 586-93; §§ 693, 704-18, and 740, being repealed by Acts 1920, pp. 58, 58, 69, 74, 587; public free schools for counties and the Literary Fund—§§ 594-756, and §§ 604, 615, 626, 645, 653-4, 658-9, 669, 703, 719, 741, being amended—Acts 1920, pp. 58, 59, 61, 69, 72, 74, 494, 560, 600, 640; loans from the Literary Fund and bond issues for the erection and equipment as school houses—§§ 757-73; Acts 1918, p. 533; Acts 1920, p. 267; public free schools in cities, and in towns constituting separate school districts—§§ 774-86; and Acts 1922, amending § 780; Acts 1920, p. 70; pension for retired school teachers—§§ 787-805; acceptance of the Federal act giving some aid—Acts 1918, p. 131; commission to study educational conditions in Virginia and elsewhere, etc.—Acts 1918, p. 444; University of Virginia—§§ 806-33; Acts 1918, p. 538; Virginia Military Institute—§§ 834-52; Virginia Agriculture and Mechanical Col-

lege and Polytechnic Institute, and Hampton Normal and Agricultural Institute (embracing State Board of Crop Pest Commissioners, certain diseases of trees, the State Live Stock Sanitary Board, county demonstration work, and general provisions—§§ 583-933; Acts 1918, p. 302; William and Mary College—§§ 934-8; Acts 1918, p. 424; State Normal Schools for white women at Farmville, Harrisonburg, Fredericksburg, and Radford—§§ 939-46; Virginia Normal and Industrial Institute—§§ 947-69; the institution for the deaf, dumb and blind—§§ 970-8; Acts 1918, p. 484; the school for colored deaf, dumb, and blind children—§§ 979-85; general provisions as to colleges and academies and other institutions, the Miller Manual Labor School, and the Medical College of Virginia—§§ 986-1003.

For the particular subjects of bond issues, high schools, pupils, school census, school houses, teachers, etc., see these particular sub-divisions under "Education," in index to Code 1919.

For other law pertaining to education passed since Code 1919 see Acts 1918, p. 29 (relieving students of tolls); p. 424 (as to admission of women in William and Mary College); p. 425 (relieving school leagues of taxation); p. 432 (omitted taxes, etc., to go to schools); p. 471 (permitting high school subjects in primary schools, when); p. 484 (for election and removal of superintendent, professors, etc., of school for deaf and blind—see also § 975 of Code); p. 486 (prohibiting use of drinking cups in schools); p. 533 (as to short time loans by district and city school boards); § 538 (as to scholarships in the University of Virginia); p. 559 (as to donations to education); p. 569 (as to taxation); p. 840 (cottage at Catawba for tubercular teachers); p. 495 (as to normal schools giving courses in preventive medicine; and inspection of public health of children in counties); p. 73 (certain colleges placed on the year round basis); p. 210 (allowing military and naval reserve forces to hold office in school districts); p. 784 (as to vocational training for injured employees); p. 587 (as to local school taxes, and repealing §§ 740 and 2721 of the Code); and Acts 1922, p.— (as to compulsory education).

EJECTMENT

(See Burks' "Pleading & Practice" (new ed.), same title.)

See Adverse Possession; Boundaries; Unlawful Entry or Detainer

- § 1. What is ejectment and when action lies
- § 2. Ejectment and unlawful detainer distinguished
- § 3. Recovery must be on strength of plaintiff's own title

§ 1. What is ejectment and when action lies.—Ejectment is a procedure by a summons or declaration with a subjoined notice, served on the defendant by any person having at the time of the action a subsisting interest in and the right to recover, a fee simple estate or an estate for life, or for years, in land, either as heir, devisee, purchaser, or otherwise, or to recover the possession thereof, or some share, interest, or portion thereof (Code, §§ 5451-6). If the possession has been forcibly or unlawfully taken or detained not over three years, the possession may be regained by a summons in unlawful entry or detainer, but such procedure does not bar ejectment between the same parties (Code, §§ 5445-60)—see *Unlawful Entry or Detainer*.

For further statutory provisions and other law regulating the action of ejectment, see Code §§ 5457-89 and notes thereto; and closely allied procedure by petition to ascertain and establish the boundary lines of real estate, see § 5490 and *Boundaries*; and 116 Va., 873; 117 Va. 884; 120 Va. 74, 453.

Ejectment lies also where there is a right of re-entry into lands by reason of rent being in arrear, or of the breach of any covenant or condition (Code, §§ 5530-5).

§ 2. Ejectment and unlawful detainer distinguished.—In ejectment the title or the right of possession is always involved. The design of unlawful entry or detainer is to protect the actual possession, whether rightful or wrongful, and to afford summary or speedy redress and restoration. The forcible entry of the owner is unlawful; and the entry of strangers is unlawful, whether forcible or not. Judgment in unlawful detainer only restores the *status quo* (the former status or condition), but settles nothing as to the title or right of possession. (82 Va. 97.)

§ 3. Recovery must be on strength of plaintiff's own

title.—The plaintiff in ejectment must recover on the strength of his own legal (not equitable) title, and not on the weakness of his adversary's, or an outstanding title in another (118 Va. 81; 115 Va. 250; 200 Va. 164; 103 Va. 69; 91 Va. 226; 90 Va. 702). But prior peaceable possession alone is sufficient as against a stranger or trespasser who has ousted him (102 Va. 348; 90 Va. 702; 11 Grat. 172).

ELECTIONS

- § 1. Apportionment of representation
- § 2. Qualification and privilege of voters; how registered; how they vote
- § 3. Payment of capitation tax as a prerequisite to voting
- § 4. State, county, district, and city officers; vacancies
- § 5. General and special elections; when and where to be held; regulations for their conduct and government; compensation for services
- § 6. Absent voters
- § 7. Primary elections
- § 8. Pure elections
- § 9. Contested elections
- § 10. Offenses against election laws
 - (1) Judge, clerk, or commissioner failing to attend election
 - (2) Officer or other person neglecting duty or doing it corruptly
 - (3) Voting unlawfully or so advising another or attempting by threats or bribe to influence vote, or furnishing false ballot, or fraudulently putting ballot in box, or etc.
 - (4) Non-residents voting in this State
 - (5) Giving or receiving bribe for vote
 - (6) Wilfully rejecting or corruptly registering a voter
 - (7) Altering or destroying books or lists or registration

§ 1. **Apportionment of representation.**—See Code, §§ 68 to 81, and Acts 1922, amending § 79.

§ 2. **Qualification and privilege of voters; how registered; how they vote.**—See Code, §§ 82 to 108; and Acts 1920, p. 588, as amended by Acts 1922(as to woman's suffrage); and Acts 1922, p. — (as to voting machine);

§ 3. **Payment of Capitation tax as a prerequisite to voting.**—See Code, §§ 109-17.

§ 4. State, county, district, and city officers; vacancies.—For State officers, see *State Officers*. For the others, see Code, §§ 123-39, Acts 1920, p. 11, amending § 135; and *Justice of the Peace and Sheriffs, Sergeants, Constables, etc.*

§ 5. General and special elections; when and where to be held; regulations for their conduct and government; compensation for services.—See Code, §§ 140 to 201, and Acts 1920, pp. 309, 795, 38, amending §§ 155, 158, 200, respectively.

§ 6. Absent voters.—See Code, §§ 202-20, and Acts 1922, amending §§ 202-18, and Acts 1922, repealing §§ 219-20.

§ 7. Primary elections.—See Code, §§ 221-50.

§ 8. Pure elections.—See Code, §§ 251-8.

§ 9. Contested elections.—See Code, §§ 259-68.

§ 10. Offenses against election laws.—

(1) *Judge, clerk, or commissioner failing to attend election.*—Fine \$10 to \$100 (Code, § 4723).

(2) *Officer or other person neglecting duty or doing it corruptly.*—Fine not over \$500 and jail not over one year, and removal from office (Code § 4724).

(3) *Voting unlawfully or so advising another, or attempting by threats or bribe to influence vote, or furnishing false ballot, or fraudulently putting ballot in box, or, etc.*—Fine not over \$1,000 and jail not over one year (Code, § 4725).

(4) *Non-residents voting in this State.*—Penitentiary 6 to 12 months and fine not over \$500, or jail not over 12 months and fine not over \$1,000 (Code, § 4726.)

(5) *Giving or receiving bribe for vote.*—Fine \$100 to \$1,000 or jail one to 12 months (Code, § 4727).

(6) *Wilfully rejecting, or corruptly registering a voter.*—Fine not over \$500 or jail not over 12 months, or both (Code, §§ 4728, 4782).

(7) *Altering or destroying books or lists of registration.*—Fine \$50 to \$100 and jail 3 to 12 months (Code, § 4729).

EMBEZZLEMENT

See *Cheats, False Pretenses, Deceits, and other Frauds and Larceny*

- § 1. Introduction to the subject of embezzlement
- § 2. Statutes of embezzlement
 - (1) Embezzlement deemed larceny; indictment; statement from attorney for the Commonwealth
 - (2) Embezzlement by officers, etc., of public funds; how punished; default in paying over funds evidence of guilt
- § 3. Form of "description" in warrant or indictment

§ 1. Introduction to the subject of embezzlement.—Embezzlement is the fraudulent appropriation to one's own use, of property or money entrusted to him by another, and by the common law was no offense (except embezzlement of public money or property, which was a misdemeanor), but was deemed a mere breach of trust, against which reasonable diligence and care in selecting one's agent was thought to be a sufficient safeguard.

In larceny, it will be remembered, the property must be taken from the possession (actual or constructive) after owner so that, (1) if a servant, agent, or other person steal his master's goods before they have come into the master's actual or constructive possession, it is not larceny or any offense at common law; and (2) if a bailee, trustee, agent or other person *bona fide* receives goods from or in behalf of his principal and then fraudulently appropriates them, it was not larceny, and went unpunished by the common law. Through these two gaps, in the expansion of business, many criminals escaped. To cure these defects in the common law definition of larceny, were passed the embezzlement statutes of England, Virginia, and most of the American states. The statutes were intended to make penal these two phases of theft previously not punishable. But our legislature, in view of the numerous trusts of this sort that must be confided to individuals, and their frequent abuse, has vastly enlarged the offense of embezzlement by extending its provisions to persons in various if not all positions of trust. Whether the offense is so comprehensive as to overlap the offense of larceny, concerns us not much, since by express enactments embezzlements (other than of

public funds) and certain other kindred frauds are "deemed larceny." A count for larceny may be joined with one for embezzlement. (H's G. & M., pp. 198-9.)

§ 2. Statutes of Embezzlement.—

(1) *Embezzlement deemed larceny; indictment; statement from attorney for the Commonwealth.*—"If any person wrongfully and fraudulently use, dispose of, conceal, or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading, or any other personal property, tangible or intangible, which he shall have received for another, or for his employer, principal, or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another, or by any court, corporation, or company, he shall be deemed guilty of larceny thereof, and may be indicted as for simple larceny, but proof of embezzlement under this section shall be sufficient to sustain the charge. On the trial of every indictment for larceny, however, the defendant, if he demands it, shall be entitled to a statement in writing from the attorney for the Commonwealth of what statute he intends to rely upon to ask for conviction." (Code, § 4451.)

By this statute embezzlement is "deemed larceny," and so the punishment is the same—see *Larceny*, section 1.

(2) *Embezzlement by officers, etc., of public funds; how punished; default in paying over funds evidence of guilt.*—"If any officer, agent, or employee of the State or of any city, town, or county or the deputy of any such officer having custody of public funds knowingly misuse or misappropriate the same or knowingly dispose thereof otherwise than in accordance with law he shall be confined in the penitentiary not less than one nor more than ten years, and any default of such officer, agent, employee, or deputy in paying over said funds to the proper authorities when required by law to do so shall be deemed *prima facie* evidence of his guilt." (Code § 4452.)

§ 3. Form of "description" in warrant or indictment.—

No. 1. EMBEZZLEMENT OF PUBLIC FUNDS

(Code, § 4452.)

DESCRIPTION:

"he the said C. D. then and there being an officer (or a deputy of an officer) of the said county of ———, to-wit: the county treasurer (or other official) thereof, and then and there having custody of

money and public funds of said county, did feloniously and knowingly misuse and misappropriate of the said money and public funds and dispose of otherwise than according to law, to the amount and value of ——— dollars, the same then being the public funds and money of the said county of ———."

In a proper case omit the word "county" in the above "description" and substitute in its stead the word "town," "city," or "State," as the case may be.

No. 2. EMBEZZLEMENT BY A CASHIER OF A BANK

(Code, §§ 4451, 4870.)

DESCRIPTION:

"being then and there employed as a chashier of the Pulaski Loan and Trust Company, a corporation created by the laws of this State, did, by virtue of his place and employment as such cashier, then and there whilst so employed, receive and take into his possession, certain money; to-wit, the sum of ——— dollars, for and in the name and on the account of the said Pulaski Loan and Trust Company, and the said money, so as aforesaid, coming into his possession by virtue of his employment as cashier aforesaid, the said C. D., in the county aforesaid, then and there did wrongfully, fraudulently, and feloniously use, dispose of, conceal and embezzle. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said C. D., in the manner and form aforesaid, the said money, the property of the said Pulaski Loan and Trust Company, from the said company, then and there feloniously did steal, take, and carry away."

No. 3. EMBEZZLING MONEY RECEIVED FOR ANOTHER PERSON

(*Idem.*)

DESCRIPTION:

"five pieces of gold coin, current in this Commonwealth, called "eagles," of the value of ten dollars each, of the moneys and coin of the said A. B., which said pieces of gold coin the said C. D. had lately before received for one P. G., did feloniously, wrongfully, and fraudulently use, dispose of, conceal, and embezzle."

Instead of this and the following the indictments for larceny may be used. In any event, if the offense be a misdemeanor, omit "feloniously" and in its place insert "unlawfully."

No. 4. EMBEZZLING A BANK NOTE RECEIVED BY VIRTUE OF AN OFFICE, TRUST, OR EMPLOYMENT

(*Idem.*)

DESCRIPTION:

"one bank note for the payment of ——— dollars, and of the value

of ——— dollars, the bank note and property of the said A. B., which said bank note the said C. D. had lately before received by virtue of his office (or *trust* or *employment*), did feloniously, wrongfully, and fraudulently use, dispose of, conceal, and embezzle."

If the goods embezzled be two or more bank notes, say: "divers, to-wit: four (or other number) bank notes for the payment of divers sums of money, in the whole amounting to ——— dollars, and of the value of ——— dollars," &c., as above.

No. 5. EMBEZZLING BILL OF EXCHANGE, PROMISSORY NOTE, CHECK, ORDER, DRAFT, OR BOND, ENTRUSTED OR DELIVERED TO A PERSON

(*Idem.*)

DESCRIPTION:

"one bill of exchange for the payment of ——— dollars, and of the value of ——— dollars, the said bill of exchange then being the property of the said A. B., and the said sum of ——— dollars payable and secured by and upon the said bill of exchange being then due and unsatisfied to the said A. B., the proprietor thereof, which said bill of exchange had lately before been entrusted and delivered to him, the said C. D., by the said A. B., (or 'by any court, corporation, or company,' as the case may be), did feloniously, wrongfully, and fraudulently use, dispose of, conceal and embezzle."

In case of a promissory note, check, order, draft, or bond, substitute such writing in the above warrant instead of "bill of exchange."

The three preceding warrants represent the three phases of embezzlement under section 4451 of the Code, and are adapted to three kinds of property, but the description of the property in either may be substituted in either of the other two forms, as the particular case may require. Or if any other property be embezzled, describe it with reasonable certainty.

EMINENT DOMAIN

- § 1. Definition
- § 2. Taking private property for public use
- § 3. Damaging private property for public use
- § 4. Effort to purchase must first be made
- § 5. Jurisdiction
- § 6. Entry for purpose of examining and surveying; liability for injury or trespassing
- § 7. When dwelling-house and premises must not be invaded
- § 8. When and how company may enter upon contiguous land for necessary material, or construction of water supplies, etc.

- § 9. Condemnation proceedings
- § 10. Other statutory provisions from chapter on "Eminent Domain"
- § 11. Miscellaneous provisions as to eminent domain

§ 1. Definition.—Eminent domain is the inherent sovereign right and power of the State, by legislative enactment and judicial condemnation proceedings thereunder, to take or control private property for public use, by making just compensation therefor.

§ 2. Taking private property for public use.—The Virginia Constitution (§ 58) prohibits the taking or damaging private property for public uses, without just compensation, and the United States Constitution (5th Amendment) says, "nor shall private property be taken for public use, without just compensation." These provisions are not a grant of power to the legislature, but a restraint upon that power (107 Va. 566), requiring just compensation to be made. The right of eminent domain is the right of the State to take or control the use of private property, or the fee simple title, for the public benefit, when public necessity demands. This right remains dormant in the State until legislative action points out the occasions, the modes, the conditions and the agencies for the purpose. The whole question, as to the interest taken (whether the use or the fee), the necessity or expediency for taking any particular property, and the like, is for the legislature and not the court; but whether the use is public, and the procedure for the taking and compensation, is for the court, and the decision of the State court that the taking is authorized, will not be questioned or reviewed by the U. S. Supreme Court. Courts may supervise the exercise of the right of eminent domain, but they cannot curtail its legitimate scope, (80 Va. 619, 622-8; 109 Va. 138; 205 U. S. 598; 106 Va. 376.)

The compensation must be in money, and not rights or interest in the property or works of the taker; and no benefit however great, which may result to the landowner from the taking can diminish the amount of compensation (108 Va. 502; 21 Grat. 178-9.)

Whether a particular use is public or not is for the court and not the legislature. A use to be public need not be for the use and benefit of the whole public or State, or any large part of it. It may be for the inhabitants of a very small or

restricted locality; but the use and benefit must be in common, not to particular individuals or estates (109 Va. 138; 107 Va. 424).

Private property can never be taken for private use; so a mining, manufacturing, or lumber company cannot take private property for passways, tram roads, etc. (119 Va. 348). The general public must have a definite and fixed use of the property to be condemned, independent of the person or corporation for whom condemned (116 Va. 142.)

§ 3. Damaging private property, for public use.—Under the Constitution (§ 58), the legislature is prohibited from enacting “any law whereby private property shall be taken or damaged.”

It was the intention of the addition by the framers of the new Constitution, of the words “or damaged” to make it just as unlawful to damage as it was theretofore unlawful to take private property for public use without just compensation (105 Va. 108, 113).

Therefore, a person is now entitled to recover for every physical injury to his property, whether by noise, smoke, gases, vibrations, or otherwise; and there need be no physical invasion of the owner's property (107 Va. 562.)

The measure of damages is the difference between the value of the property before, and after the construction or improvement (10 Va. L. R. 741).

§ 4. Effort to purchase must first be made.—Except in the case of incapacity of some of the owners to contract, or they are unknown or cannot with reasonable diligence be found in the State. (Code, § 4363.)

§ 5. Jurisdiction.—Jurisdiction to condemn land or other property (i. e., personal property), is in the circuit or corporation court of a city (or the Hustings Court of Richmond), or the judge in vacation, where the property is located therein; and in the circuit court of a county, or the judge in vacation, where the property or the greater part thereof is located. (Code, §§ 4361, 5913.)

§ 6. Entry for purpose of examining and surveying; liability for injury or trespassing.—Any public service corporation or company (see *Corporations*, section 2) may enter lands or waters to examine, survey, and lay out such as may

seem fit; but no injury must be done the owner or possessor thereof. It must not throw open fences or inclosures, or construct its works upon or through the same, or in any way injure the property without his consent. (Code, § 4362.)

§ 7. When dwelling-house and premises must not be invaded.—Such company must not invade a dwelling-house in a city or town, or any space within 60 feet thereof, without his consent, except in the case of a railroad company (whether operated by steam or electricity, or other motive power) where it is decided by the commissioners that it would otherwise be impracticable, without unreasonable expense, to construct such railroad; and except also, in the case of the occupancy of a railroad company of the streets or alleys, public or private, under permission of the city or town authorities. Nor must such company invade a dwelling-house in a county, without the owners' consent, except in the case of a railroad company, where the court affirming the commissioners' report decides that it would otherwise be impracticable, without unreasonable expense, to construct such railroad by reason of the conformation of the country; and except also in the case of cities or towns or water companies acquiring property for a reservoir or water works, or to prevent the pollution of waters therein or connected therewith, where it is decided by the court affirming the commissioners' report that it would otherwise be impracticable, without unreasonable expense, to construct or maintain such reservoir or water works, or to prevent the pollution of said waters by reason of the conformation of the country. (Code, § 4362.)

§ 8. When and how company may enter upon contiguous lands for necessary material, or construction of water supplies, etc.—Such company may, after notice and condemnation proceedings therefor, enter upon any convenient lands for wood, sand, stone, gravel, earth or other material necessary for the construction, maintenance, operation, or improvement of its work, and also for any and all necessary water not required by the owner, for its engines, locomotive or stationary, and for other purposes; and may by regular condemnation proceedings condemn all necessary land contiguous to such water. But the company must not cut down any fruit, shade, or ornamental trees, nor take any building, nor any of said things from any lot in a city or town. Before

taking said things, the company, unless it agrees thereto, must give ten days' notice of its intention to apply for the appointment of commissioners to assess the compensation to the tenant of the freehold, and (in case of water) to the owner or tenant of the land on which the water is located, and in any event must give like notice to riparian owners (i. e., owners along the bank of the stream) having an interest likely to be affected by the condemnation proceedings. Upon confirmation of the commissioners' report and payment of the compensation fixed and any damages, the company may proceed to take and do the things above mentioned. (Code, § 4382.)

§ 9. Condemnation proceedings.—For petition, application for and appointment of commissioners to ascertain the value of the land or other property, or the interest or estate therein to be taken, their oath and report and its confirmation, see Code, §§ 4364-70, 4372-8, 4381, 4383, 4387.

§ 10. Other statutory provisions from chapter on Eminent Domain.—For when company may begin work during pendency of proceedings and no injunction is to be awarded, see Code, § 4371; as to how company may change location (when the title reverts to the former owner—118 Va. 11), § 4379; as to contracts running as a covenant with the land, § 4380; this law does not include condemnation of cemeteries or burial grounds, § 4384—see §§ 53, 56; condemnation for school and certain State institutions, § 4385; when sheriff may remove forcible resistance to condemnation, § 4386; when report of commissioners vacated § 4387; this chapter (176) not to affect § 3882 as to condemnation by one corporation of the property of another, § 4388.

§ 11. Miscellaneous provisions as to Eminent Domain.—For condemnation by United States for custom house, court-house, post-office, etc. (Code, § 19); coast survey (§§ 21-25); cemeteries (§§ 53-56); school houses and school institutions (§§ 672, 786, 852, 4385); hospitals (§§ 1555-8); drainage districts (§ 1747); roads, landing or bridge, (§§ 1977-81); tramway or railway crossing (§ 2008); by city or town (§§ 3031, 3040, 3065); erection of dam (§§ 3852-3593); water supply (§§ 852, 2906, 3040, 4385); by one corporation of another's property (§§ 3832-3); by railroad of land, sand, earth, water,

and other material (§ 3857, as amended by Acts 1920, p. 305; § 4382); where public service corporation crosses works of another or crosses or changes course of public road (§ 3884; § 3885, as amended by Acts 1920, p. 411); by telegraph and telephone companies (§ 4040); by public utility companies (§ 4063).

For acts passed since the Code, see Acts 1918, pp. 509, 568 (condemnation of property in Virginia by the United States); Acts 1918, p. 133 (condemnation by cities over 100, 000 of lands for street, road, and avenue purposes outside the corporate limits); Acts 1919, p. 31 (prescribing how material for roads and bridges are to be procured and paid for); Acts 1919, p. 53 (giving to State Highway Commission the right of eminent domain.)

EMPLOYER AND EMPLOYEE

See Agents and Agency, and Apprenticeship

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- § 1. Relation depends on contract
- § 2. Effect of hiring for specified time
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- § 5. When employer liable for wrongs done by employee to third person
- § 6. Liability of employee for his wrongs
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II. Workmen's Compensation Law

- § 1. General scope of the law
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 - (1) Notice of accident by employee to employer

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- (15) Meaning of the term "farm laborers"
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- (17) Method of calculating period of disability
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- (20) Loss of part of phalanx of finger or toe

§ 14. Informal Opinions

- (1) "Employees" as defined by the act
- (2) "Employers" as defined by the act
- (3) Liability of principal contractor to employees of sub-contractors
- (4) Medical services
- (5) Agreement with employee as to compensation liability
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- (7) Torts committed by a third person
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§ 15. Rules for appeals from the Industrial Commission

III. Vocational Rehabilitation and Education of Injured Employees

- § 16. Establishment of division of vocational rehabilitation**
- § 17. Application for aid**
- § 18. Appointment of applicants**
- § 19. How compensation determined**
- § 20. Appropriation**
- § 21. Power to accept gifts; co-operation with Federal government**

§ 22. Description of various forms under "Workman's Compensation Law"

This subject is usually treated under the more legal heading of "Master and Servant," the master being anyone who exercises personal control or authority over another, and that other is called in law his servant. The relation of master and servant pervades the whole of society. Excluding slavery, menial servants, agency, and apprenticeship here, we consider more narrowly the relation of employer and employee.

I. /THE SUBJECT GENERALLY

§ 1. **Relation depends on contract.**—The relation of employer and employee depends on contract, which may be expressed or implied; but if it is not to be performed within a year it must be in writing (Code, § 5561 (7)). Service voluntarily accepted, implies a promise to pay for it what it is reasonably worth, unless it can be inferred to the contrary, as it sometimes may where the service is rendered to a near relation. (1 Minor, 208-9.)

§ 2. **Effect of hiring for specified time.**—A contract to serve for a specified time, or until some specified result is accomplished, is called in law an entire contract, which must be completely performed (unless prevented by the act or default of the employer, or by act of providence), before any right to compensation accrues, and that notwithstanding the wages be estimated by the month, week, etc., though otherwise if they are expressly payable monthly, weekly, etc., but if the employee is paid for the work already done, the employer cannot recover it back. On the other hand, the employer is bound to pay for the entire time where he wrongfully dismisses him; but he may resist or reduce the recovery by showing a total or partial failure of consideration or of performance. (1 Minor, 209-10; Code, § 6145.)

In the case of an entire contract, where the employee is dismissed for just cause, he can recover no compensation. Good causes for dismissal are, moral misconduct (pecuniary or otherwise) wilful disobedience, habitual neglect, or any conduct injurious to the employer's interest, but temporary absence without leave, occasional sulkiness, etc., is not sufficient.

But if he is wrongfully dismissed he may perhaps re-

cover the entire contract price or at least the damage actually sustained; or if he prefers, sue merely for the work actually done. (1 Minor, 212-13.)

§ 3. To whom minor's wages should be paid.—The father, and the mother, if she is the lawful custodian of the child (Code, § 5320), is entitled to the services and earnings of a minor, unless the parent relinquishes the claim, which, however, is easily implied, as where the child has for some time been permitted, without objection, to receive his wages himself. Payments to the parent, therefore, will in general be valid. (1 Minor 216.) See, also, section 5, under *Parent and Child*, and section 3, under *Guardian and Ward*.

§ 4. Employer's responsibility for safety of employee.—The employer has no right to expose his employee to danger without the latter's consent, and is bound to provide for his safety in the course of his employment, to the best of his judgment, information, and belief; but the employer is not responsible for an accident, happening without his default, unless he knew that the service exposed the employee to peculiar danger, and the employee did not.

As to injuries arising from the default of fellow-employees in the course of their common business, the employer (other than a railroad company) is not liable, if he has selected as his employees persons of competent care and skill, having reference to the employment, and is not himself guilty of any neglect or default in the structure or management of the buildings or machinery, or the conduct of the business. But if the injury occurs to the party injured when he is not actually employed in the common business, the employer is liable. (1 Minor, 216-17.)

Now, by section 162 of the Virginia Constitution and sections 5791-3 of the Code, the doctrine of non-liability of the employer where the injury occurs by the negligence of a fellow-employee, commonly called the "common law doctrine of fellow servant," is abolished as to railroad companies, as follows:

Section 5791 of the Code provides that a common carrier by railroad (but not an electric railway—Code, § 5796), engaged in commerce in the State, is liable in damages to an employee suffering injury while he is employed by such carrier

in such commerce, or in case of his death, to his personal representative, for such injury or death (not over \$10,000 in case of death), resulting in whole or in part from the wrongful act or neglect of any of the officers, agents, servants, or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment. And in case of death, sections 5787-90 of the Code (as amended by Acts 1920, p. 26), as to death by wrongful act, applies—see *Death by Wrongful Act, etc.* Nor can a common carrier by contract exempt itself from any such liability (Code, § 5794).

The suit must be brought within one year (Code, § 5791). And by section 5792-3 of the Code, in suits against common carriers, contributory negligence by the employee is no bar to recovery, but the damages may be diminished in proportion to the amount of his negligence; and no such contributory negligence nor any assumption of risk is considered where the carrier's violation of any statute for the safety of employees contributed to the injury or death; and the knowledge of the employee "of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such carrier, shall not of itself be a bar to recovery."

The foregoing sections does not include steam railroads used primarily and chiefly "as incidental to the operation of coal, gypsum or iron mines, or saw mills, nor a railroad owned or operated by any county" (Code, § 5795).

The pleading may embrace liability under both the State and Federal acts (Code § 5796). See, for Federal act, 19 Va. L. R. 171; 20 Va. L. R. 788.

So that now, a railroad company is held liable if an employee is injured by the negligence of a fellow employee, where the employer, (1) fails to use reasonable care to provide a safe place for the employee to perform his work; or (2) fails to use like care to provide proper tools and appliances for the conduct of the work in which the employee is engaged and to see they are kept in proper condition and repairs by frequent inspection; or (3) fails to use like care to employ a sufficient force of competent workmen so far as may be necessary for the safety of the employee; or (4) fails to promulgate and

enforce reasonable rules for the conduct of the work, if the business be so complicated as to necessitate such rules, in order properly to secure the employees safety; or (5) fails to use his superior skill, judgment, and intelligence to protect his employee from injury by reason of latent and unseen or unknown defects and damage, so far as reasonable care and foresight can accomplish this result. (Pocket Code, 1920, p. 951.)

§ 5. When employer liable for wrongs done by employee to third person.—An employer is liable for the tortuous or wrongful acts, as, fraud, negligence, and want of skill, of his employee which were done in the course of his employment, except in the case of contractors (but see section 20 of "Workmen's Compensation Law"—Acts 1918, p. 637); but he is not liable for his wilful and malicious trespasses which the employer did not authorize, or afterwards sanction, except in the case of common carriers (see Code, §§ 3928-9, as amended by Acts 1918, p. 467), and hotels or innkeepers (see Code, §§ 1602-6), who are responsible as insurers of goods committed to them, even for wilful wrongs. For the law as to liability in the case of contractors, see section 20 of the "Workmen's Compensation Law"—Acts 1918, p. 637 and *Architect and Builder*.

§ 6. Liability of employee for his wrongs.—The employee is liable to third persons for wrongs committed by him in the course of his employment, as the employer also is (except in the case of wilful or malicious injuries).

The employee is liable to his employer not only for all injuries proceeding directly from bad or non-performances of his duties, but also for all losses which the employer may sustain by recoveries against him on account of the default of the employee toward others, by his false and fraudulent conduct, by his ignorance, neglect or unskilfulness. (1 Minor, 243-4.)

§ 7. Various statutes for the protection of employees.—For the various statutes for the protection of female, minor, or discharged employees, and employees in general see Code, §§ 1807-34, and Acts 1922, amending §§ 1807, 1817, 1822, 1830-1; and Acts 1918, pp. 347, 363, 440, 620, 756; Acts 1920, p. 840. For "Department of Mines", see Code, §§ 1835, etc.; and "Bureau of Labor and Industrial Statistics," §§ 1797, etc. Employment agency is forbidden to induce employee to leave employment (Code § 1804); person or corporation employed

to hire or discharge employees, prohibited from receiving fee or percentage of wages (Code, § 1805); punishment of employees for violation of law relating to intoxicating liquors (Code, §§ 4584, 4595, 4650); corruptly influencing employees, punished (Code, §§ 4712-13); authority of employer over minor employee (Code, § 5301); as to garnishment of wages of employees of State, and of county, city, or town (Code, §§ 6559-61); lien of employee against certain companies (Code, §§ 6438-9); certain devices required in buffing wheels, etc., in machine shops (Acts 1918, p. 440); co-operating with the Federal government for the vocational rehabilitation of persons disabled in industry or otherwise (Acts 1922, p. —).

II. WORKMAN'S COMPENSATION LAW

(Acts 1918, p. 637, as amended by Acts 1920, p. 256, and Acts 1922, p. —, amending §§ 2, 39, 45, 46, 61 and 69; Pollard's Code Biennial 1920, p. 609; Pocket Code 1920, § 5796b; and Bulletins and Rules of the Industrial Commission of Virginia.)

§ 1. General scope of the law.—Virginia now has, along with nearly all of the other states and territories, a uniform comprehensive "Workmen's Compensation Law," which provides payment for all injuries to employees according to a schedule of the various injuries, with the rate and period of compensation. More fully, according to its title it is "An act to prevent industrial accidents; to provide medical and surgical care for injured employees; to establish rates of compensation for personal injuries or deaths sustained by employees in the course of employment; to provide methods for insuring the payment of such compensation; to create an industrial commission for the administration of this act, and to prescribe the powers and duties of such commission; to levy a tax and appropriate funds for the administration of this act."

§ 2. Whom the act includes.—The act includes all individuals, firms, contractors, or corporations, having regularly in their employ eleven or more persons in the same business, excepting casual employees, farm laborers and domestic servants, unless such employers exclude themselves therefrom by giving notice to their employees and by sending to the industrial commission proof of its service on the employees.

Election to reject the provisions of the act on the part of the employer is conditional upon his being deprived of the common law defenses of assumption of risk, negligence of the employee and negligence of a fellow-employee, so that the employer refusing to accept the provisions is virtually deprived of all defense to a suit brought by his employee to recover damages for death or personal injury sustained in the course of employment. The State, municipalities and all the political sub-divisions of the State are included within the operation of the act, irrespective of the number of persons employed and without the right of election to reject, and employees includes officers and employees of the State, except those elected by the people, or by the legislature or appointed by the Government; and also includes officers and employees of a city or town and political sub-divisions of the State, except those elected by the people, council or other governing body, who act in purely administrative capacity and serve for a definite term of office. Policemen and firemen are employees.

This act does not of course apply to common carriers by railroad engaged in interstate commerce. Nor does it apply to common carriers whose motive power is steam and engaged in trade and commerce within the State, unless such employees and their employers voluntarily elect to be bound by the act.

§ 3. Fundamental principle of workmen's compensation.—The fundamental principle of workmen's compensation is that the burden of these accidents should be borne by industry and that the cost should be added to the selling price of the product and distributed among the consumers. It is based upon the principle that the loss occasioned by an injury to a workman in the course of his employment is as much a part of the ultimate cost of the article produced as is the loss occasioned by the destruction of material or the wearing out and replacing of tools and machinery. Losses of the latter kind have always been regarded as expenses to be included in the ultimate cost of the commodity produced, and it is just as logical to include the expenses of an injury to a human employee in the cost of production of the commodity when the injury is caused by an accident in the course of his employment. The personal loss to the employee is as legiti-

mately an element of the fair money cost of the product as are expenditures for raw material, machinery and wages. In other words, compensation legislation is based upon the fundamental thought that accidents are an inevitable result of production, the cost of which is measured in money and in human sacrifice, and that two contributors are entitled to a fair return, namely, the man who invests his money and the man who loses life or limb in the process of production.

§ 4. The consumer pays the compensation.—It is an error to say that the burden of the compensation cost is placed upon the employer. Compensation is made to fall upon the employer in order that it may ultimately reach the consumer. The employer is the only person who has the means and adequate knowledge to distribute it among those who enjoy the finished product. Moreover, the employer is not compelled to advance the total loss in any particular case. The insurance principle applies here as elsewhere. The employer secures his risk by a relatively small annual payment for compensation insurance and figures this expenditure in his cost of production just as in the case of insurance against fire or hail, or any other unpredictable hazard. Also in many States compensation liability is carried at rates not greatly in excess of the rates formerly charged for employers' liability.

§ 5. Employee not relieved of responsibility.—Nor can the Virginia act be said to relieve the employee of responsibility, moral or financial. Under its provisions, the injured employee still loses his wages for the first fourteen days of disability (and about seventy per cent. of all injuries fall within this class), and for the period of disability extending beyond the fourteenth day he is entitled to only one-half his former wages, in no case to exceed ten dollars a week or a maximum of four thousand dollars. Besides, the employee cannot collect if his injury was due to intoxication or wilful misconduct or wilful failure or refusal to use a safety appliance or perform a duty required by statute.

The law provides merely that industry shall bear a part of the burden of all accidents and leaves the employee to bear the remaining portion, care being taken that industry's portion shall be secured by insurance and that payments shall be made promptly and without litigation and expense.

§ 6. Administration of the act.—The administration of

the act is vested in a commission of three members, appointed by the Governor. The commission is empowered to make rules necessary for carrying out the provisions of the act, to conduct hearings and to provide the machinery for the investigation of matters coming within its jurisdiction. Procedure before the commission will be as simple and summary as possible. Hearings will be devoid of technicalities, and an attempt will be made to ascertain the facts and to bring the parties together on a basis of justice and mutual understanding. The commission will also pursue an open door policy in regard to meeting employers, employees, insurers and others concerned. The members of the commission are available at all times for consultation, advice and hearing. If advice or information is desired at any time, there should be no hesitancy in writing or in calling at the offices of the commission. Copies of the act and forms to meet its requirements have been prepared. They will be sent free of cost upon request. No new law can be put into operation without causing trouble to some one. The Virginia workmen's compensation law will prove no exception to this rule. The commission intends, of course, to administer the law with firm, impartial hand, but it hopes to accomplish this without material disturbance to industry and with as little inconvenience as possible to all concerned. In this difficult task, the commission asks the aid and co-operation of all citizens of the State, employers and employees alike. The present members of the Industrial Commission of Virginia are Hons. Richard F. Beirne (successor to Hon. R. H. Tucker), Chairman, C. A. McHugh, and C. G. Kiser.

§ 7. Benefits of compensation.—The benefits of compensation may be briefly summarized as follows:

(1) The employee obtains certain and speedy relief. This relief comes at the time when it is most needed, and the sum, though moderate, is not reduced by legal expenses.

(2) The employer knows exactly what he must pay. The compensation payments are reasonable in amount. There is no longer the uncertainty and expense of damage suits. What the employer pays will go without waste to his injured workman, and the payments will usually be spread over a number of years.

(3) Employer and employee are brought into closer and

more harmonious relations. The one gives up his common law defenses, the other abandons his chance to win a verdict for heavy damages, and both adopt the principle of reasonable compensation and fixed liability.

If, in spite of these benefits of compensation, you decide to reject it and run the risk of heavy damages in action at law with practically no defenses, you should apply to the industrial commission for form to be used for election not to operate under the act.

§ 8. Employer should insure liability.—If you decide to accept the provisions of the act, you should immediately in one of the ways provided in the act, insure your own liability, namely:

(1) By taking insurance in some corporation, association, organization or State insurance fund authorized to transact the business of workmen's compensation insurance in this State, or

(2) By becoming a member of some mutual insurance association so authorized, or

(3) By furnishing to the industrial commission satisfactory proof of financial liability to pay direct compensation when due, and obtaining from the commission an order of exemption from the necessity of taking out insurance.

Employers who fail to take any of the steps indicated above are subject to fine for each day of non-compliance after January 30, 1919, and, at the instance of an injured employee, are liable to suit for damages with the common law defenses removed. For act regulating reciprocal contracts of insurance, see Acts 1920, p. 256. For act as to licensing companies to engage in industrial insurance, see Acts 1920, p. 266.

§ 9. What the employer should do after accident.—

(1) As soon as the accident occurs the employer should immediately furnish to the injured employee such medical or surgical attendance as the case may require.

(2) Record, on blanks approved by the industrial commission, all accidents causing disability of more than one day. (Form 45.)

(3) Report to the industrial commission, on prescribed forms and within ten days from the date of the accident, all accidents causing absence from work of more than seven days. (Form 8.)

(4) Upon termination of disability of the injured workman, or if the disability extends beyond a period of sixty days, then also at the expiration of such period, the employer shall make a supplementary report on blanks procured from the commission for the purpose. (Detachable portion of Form 8.)

(5) Ascertain the average weekly earnings of the injured or deceased employee as defined in the act.

(6) Consult sections 29 to 32 of the act to ascertain the amount of compensation and the length of time during which it must be paid.

(7) If the disability of the injured employee is of more than six weeks, or if death follows the injury, an effort should be made on or after the fourteenth day following the accident to effect an agreement as to compensation with the injured employee, or the dependents of the deceased employee. Such agreement should be on forms approved and procurable from the commission and should be signed in ink by both parties and forwarded to the commission for approval.

(8) A receipt should be taken for all compensation payments, and the final receipt, on approved form and summarizing the entire transaction, must be filed with the commission.

(9) Should the employer and the injured employee, or his dependents, fail to agree upon the facts, the employer should await the filing of a claim petition by the injured employee. The employer should then, within seven days, answer the petition as the case may warrant.

§ 10. What employee to do when injured.—(1) Promptly notify the employer in writing of the accident and request him to provide medical services. (If after request the employer neglects or refuses to provide medical treatment, or if the injury requires medical treatment and the employer or the superintendent or foreman, having knowledge of the injury, shall have neglected to provide medical services, the injured employee has a right to claim compensation for a reasonable amount to cover medical services). Keep a copy of the notice you send your employer.

Failure to give notice within 30 days after the accident may deprive you of the right to compensation.

(2) If disability lasts longer than 14 days then make a claim in writing to your employer for compensation, at the

same time notify the industrial commission. Forms for this purpose can be obtained from your employer or from the industrial commission.

If death results, dependents should make the claim.

(8) The employer and the employee may agree as to compensation, provided the amount and time and manner of payment are in accordance with the provisions of the law. If no such agreement is made, claim for compensation should be made to the industrial commission on forms furnished by the commission on request.

Notices to the employer should be sent to the real employer rather than the foreman.

Claims may not lawfully be sold or traded away.

Claims are barred (outlawed) if not made within a year after accident or death; but notice of accident should be given promptly, and always within 30 days.

Prompt notices, prompt medical treatment and claims promptly filed will make the matter easier of determination.

§ 11. Benefits to employee provided by law.—If an employee sustains an injury "arising out of and in the course of his employment," he is entitled to

(1) Medical, surgical and hospital treatment for 30 days after the injury (this treatment to be provided free by the employer), but the claimant cannot hold the employer liable unless he shall have notified the employer of the accident and the need of such treatment or unless the employer or his agent or representative, having knowledge of the injury, shall have neglected to provide medical treatment.

The employer may, at his option, continue to furnish medical services beyond the 30 day period. Refusal on the part of the employee to accept the medical services provided by the employer will act as a bar to compensation during the period of such refusal, except for good cause approved by the industrial commission.

(2) Disability benefits: After 14 days the claimant is entitled to one-half his average weekly wages, but not more than ten dollars nor less than five dollars a week and not to exceed a period of 500 weeks or a total of \$4,000.

Claimant is entitled for loss of thumb to one-half his average weekly wages during 60 weeks; index finger, 35 weeks; second finger, 30 weeks; third finger, 20 weeks; fourth finger,

15 weeks; great toe, 30 weeks; each other toe, 10 weeks; hand, 150 weeks; arm, 200 weeks; foot, 125 weeks; leg, 175 weeks; eye, 100 weeks; both hands or both feet or both arms or both legs or both eyes or any two thereof, 500 weeks. In all cases payments are to be not more than ten dollars nor less than five dollars a week.

Loss of one phalange (joint) of finger or toe equal loss of half the finger or toe; loss of more than one phalange is equal to loss of entire finger or toe.

If the claimant, because of disability, returns to work for lower wages, he is entitled to one-half the difference between his new wage and his former wage, but not more than ten dollars a week, nor for a longer period than 300 weeks.

(3) Death benefits: Burial expenses, not to exceed \$100.

To persons wholly dependent upon the deceased employee's earnings for support at the time of the accident, one-half his average weekly wages, but not more than ten dollars nor less than five dollars a week, for a period of 300 weeks from date of the injury.

To persons only partly dependent, weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of the injury.

If the dependents of the deceased employee do not reside in the United States or Canada, the amount of compensation cannot exceed \$1,000.

(4) "Average weekly wages" mean earnings during the period of the fifty-two preceding weeks divided by fifty-two or if employment has been for a period less than fifty-two weeks, the earnings of that period divided by the number of weeks.

Wages include overtime and allowances of any character specified in the wage-contract.

(5) Aliens are entitled to the same compensation as citizens of the United States, with the exception for dependents noted in (3) above.

(6) A claimant will not be entitled to compensation if his injury resulted from his intoxication or his wilful intention to injure himself or another or from his "wilful failure

or refusal to use a safety appliance or perform a duty required by statute or the wilful breach of any rule or regulation adopted by the employer and approved by the industrial commission, and brought prior to the accident to the attention of the employee."

(7) Employers must insure their workmen and post notices to that effect. Workmen may know by these notices whether or not the employee is insured.

(8) When the attendance of desired witnesses cannot otherwise be secured, the employee should apply to the industrial commission or the deputy hearing the case to have such witnesses subpoenaed.

(9) After an award is made it is conclusive and binding as to questions of fact, and the employer or his insurance carrier must pay compensation promptly; but if either party in interest desires to appeal to the courts on errors of law, he has thirty days after receipt of notice of award in which to take such appeal.

If the hearing is before a commissioner or deputy, either dissatisfied party may apply, within seven days, for a hearing before the full commission.

Do not neglect your compensation case. Especially do not fail to give proper notice immediately after injury. Neglect and delay cause trouble and may deprive the claimant of the right to compensation.

The foregoing instructions do not cover every question that may arise but embrace the main features of the law. If they do not make your case clear, ask for further information. Information can be had at any time by applying to the industrial commission.

§ 12. Summary of procedure under the act.—

(1) *Notice of accident by employee to employer.*

A. Employee must in writing notify employer of injury, unless employer has this knowledge.

B. Employer must immediately provide necessary medical and surgical treatment and supplies, and continue to make such provision for thirty days after the accident.

(2) *Record and report of accidents by employer to industrial commission.*

A. Employer must keep, on form provided by indus-

trial commission, record of all injuries causing disability of more than one day.

B. Employer must report to industrial commission, on approved forms, every injury to an employee causing absence from work for more than seven days.

C. Supplementary report must be made upon termination of disability or if disability extends beyonds a period of sixty days.

(3) *Method of determining amount of compensation Due.*

- A. Agreement between employer and employee.
Employer and employee may in writing agree on compensation due.
 - (a) This agreement must not—
 - (1) Be made before the fourteenth day after the accident.
 - (2) Permit of "lump sum" payments.
 - (3) Vary from the provisions of the law as to amount or manner of payments.
 - (b) Certified copy of the agreement must be filed with the Industrial Commission and receive its approval before it becomes binding.
- B. Agreement between employer and employee that compensation is due, but disagreement as to amount.
Petition Industrial Commission to determine compensation.
 - (a) Commission will make a ruling, or if necessary hold a hearing, and grant or disallow compensation.
- C. Disagreement between employer and employee.
 - 1. Employee may present claim for compensation to Industrial Commission.
 - (a) Certified copy of claim sent to employer.
 - (1) Within seven days, employer may deny any statements made in claim.
 - (2) Statements not denied will be considered as agreed to and will not be argued at any hearing.
 - 2. Commission notifies both parties of time and place of hearing.
 - (a) Commission, or a member thereof, or a deputy holds hearing and, if necessary, makes investigation by appointing physician to examine injury of employee and experts to ascertain other facts.
 - (b) Decision, granting or disallowing compensation.
 - (c) Copies of award sent to the parties in dispute.
 - 3. If hearing was not held before full Commission, either party may apply, within seven days, for review by full Commission.

- (a) Commission will review the evidence, or if deemed advisable, as soon as practicable, hear the parties at issue, their representatives and witnesses, and sustain, reverse or modify the previous decision.
- 4. Award of Commission is conclusive and binding as to all questions of fact, but either party may, within thirty days, appeal on matters of law to the circuit court of the city in which the alleged accident occurred or in which the employer resides or has his principal office.

(4) *Enforcement of agreements, awards, etc.*

Agreements approved by the commission, and the awards, orders and decisions of the commission, unappealed or affirmed upon approval, are enforceable in the circuit or corporation court of the county or city in which the injury occurred.

§ 13. Rules and regulations.—The act (section 55) empowers the Commission to make such rules as may be necessary to carry out its provisions. Care has been taken to avoid a multiplicity of rules. The following have been found essential to the effective administration of the law:

(1) *Office hours.*—The principal offices of the Industrial Commission of Virginia are located at Nos. 6 and 8 north Sixth street, Richmond, with office hours each day (legal holidays excepted) from 9 o'clock A. M. until 5 o'clock P. M., except Saturdays, when the offices close at 12 M.

(2). *Forms—how procured.*—The Commission has prepared and will furnish, without charge, all proper forms required by the provisions of the Virginia Workmen's Compensation Act, and such forms must be used in all cases where they are appropriate.

For purposes of convenience, insurance carriers will be permitted to place their names and business addresses above the other matter prescribed by the Commission on such forms as they may prepare for their convenient use.

(3) *Posting notices.*—Every employer within the operation of the Virginia Workmen's Compensation Act shall post and keep posted, conspicuously in his plant, shop or place of business usually frequented by his employees, notice of his compliance with the provisions of the act. Such notice may be in writing or in print, and shall follow substantially the form prescribed by the Industrial Commission (Form No. 1).

(4) *Manner of giving notice by employee to employer.*—Notice of injury shall be served upon the employer or any of his agents upon whom a summons in civil action may be served under the laws of this State, or may be sent by registered letter addressed to the employer at his last known residence or place of business. This notice should be given as soon as practicable after the injury has been sustained and must in all cases, be served within thirty days thereof. (Act, sections 23 and 24.)

(5) *Report of accidents by employer.*—Every employer shall keep a record of all injuries, fatal and otherwise, received by his employees in the course of their employment (Acts, Sec. 67) and report the same to the Industrial Commission promptly at the end of each quarter, commencing March 31, 1919, on blanks provided for that purpose. (Form 45).

Within ten days after the occurrence or knowledge thereof of an injury to an employee causing his absence from work for more than seven days, a report thereof shall be made in writing to the Industrial Commission on the blank provided for that purpose. (Form No. 3).

(6) *Compensation agreements between employer and employee.*—Agreements as to compensation between employer and employee are commended by the act. Such agreements must be fairly made and in accordance with the provisions of the act. Memorandum of agreement (Form No. 4), accompanied by a physician's report (Form No. 6.), shall be filed promptly with the Industrial Commission for approval or rejection.

(7) *Evidence of insurance to be filed with the commission.*—Every employer within the operation of the act shall file with the Industrial Commission proof of his compliance with the insurance provisions (Sections 11 and 68) of the the act. A notice from the insurer (Form 14) certifying this fact will be received as acceptable proof.

(8) *Insurer to notify commission of cancellation of policy.*—Any insurance carrier having issued a policy to an employer and desiring to cancel the same, shall be required to give ten days' prior notice thereof to the Industrial Commission at its offices in the city of Richmond. Likewise can-

cellations of policies for any cause shall be reported promptly to the Commission on Form 15.

(9) *Application by employer for self-insurance.*—Any employer desiring to insure his own risk under the provisions of section 68 of the act shall make application therefor on Form No. 20 and shall be required to reply as fully as practicable to all of the inquiries there made. The information so conveyed will be treated with strict confidence.

In every case where an application is favorably considered, a deposit of acceptable securities or an indemnity bond with corporate surety in an amount not less than five thousand dollars will be required. Each case will be considered upon its merits and with due regard to the probable hazard involved.

(10) *Securities—how deposited.*—All securities which may be deposited by self-insurers shall be lodged with the State Treasurer of Virginia for safe keeping, and a charge of one-twentieth of one per cent. of the amount so deposited may be required to be paid to that officer for such service.

(11) *Self-insurance by the State, its municipalities and political sub-divisions.*—Permission for self-insurance by the State and its various departments and political sub-divisions and the several municipalities of the State will be granted upon application therefor without submission of proof of financial ability and without deposit of bond or other security. Form 44 must be used for this purpose and assurance must be given the Commission that provision will be made for the payment of the four per cent. premium tax provided for in section 75 (j) of the act.

(12) *Information concerning financial condition of self-insurers.*—No record of any information concerning the solvency and financial ability of any employer acquired by a commissioner or his agent by virtue of his powers under the Virginia Workmen's Compensation Act shall be subject to inspection; nor shall any information in any way acquired for such purposes by virtue of such powers be divulged by a commissioner or his agent, unless by order of the court, so long as said employer shall continue solvent and the compensation legally due from him, in accordance with the provisions of the act, shall continue to be paid.

(13) *Variation in number of employees.*—When within a given year an employer having eleven or more persons in his employ has complied with the provisions of the act and the number of his employees is subsequently reduced to less than eleven, such employer shall, in the absence of contrary notice to the Industrial Commission, be held to continue under the operation of the act for the remainder of the year. In this event, the employer shall keep proper notice posted in and about his place of business. Nothing contained in the foregoing rule shall be construed as limiting or restricting the right of any employer to reject the provisions of the act by giving proper notice thereof.

(14) *Elections by employers with fewer than eleven employees.*—When within a given year an employer having fewer than eleven persons in his employ, has with his employees, elected to come within the provisions of the act, and has filed memorandum of such election, signed by himself and his employees, with the Industrial Commission of Virginia and has otherwise complied with the provisions of the act, such employer shall, in the absence of contrary notice to the Industrial Commission, be held to continue under the provisions of the act for the remainder of that year. In this event, the employer shall keep proper notice posted in his plant or place of business. Nothing contained in the foregoing rule shall be construed as limiting or restricting the right of any employee to reject the provisions of the act by giving notice thereof.

(15) *Meaning of the term "Farm Laborers."*—The term "farm laborers," exempted by the language of section 15 from the operation of the act, is interpreted to mean persons engaged in horticulture as well as agriculture and in dairying and stock-raising when these are combined with farming.

(16) *Meaning of the term "domestic servants."*—The term "domestic servants" as used in section 15 of the act applies to servants employed by private individuals for service in or about a private residence. It does not apply to servants employed in hotels, schools, restaurants and in other places of public resort or entertainment.

(17) *Method of calculating period of disability.*—To determine the period of disability for the purpose of computa-

tion, divide the number of days of disability, excluding the first fourteen days, by seven and make the denominator of the remaining fraction seven, without deducting Sundays or holidays.

(18) *Compensation for Sundays—when allowable.*—Where under the terms of employment wages are paid by the day or week, and include compensation for work done on Sundays, and an injured employee returns to work on Monday, having been disabled fifteen days, he is entitled to one day's compensation. Otherwise, he is not entitled to compensation for said single day.

(19) *Computation of waiting period in cases of recurrent disability.*—Where an injured employee returns to work, deeming himself fit to resume his former duties, and after working one or more days finds himself unable to continue work and again lays off, the waiting period shall be computed from the date of his first injury, but the days during which he was subsequently employed, and for which he received compensation, should be excluded in the computation.

(20) *Loss of part of phalanx of finger or toe.*—The amputation of any portion of the bone of the distal phalanx of a finger or toe shall be considered as equivalent to the loss of one-half of the phalanx of such finger or toe. Amputation of more than one-half of the bone of the phalanx shall be considered as equivalent to the loss of the entire phalanx. (Annual Report 1919 Indus. Com. of Va.; pp. 90 to 93.)

§ 14. *Informal opinions.*—The following opinions are selected and summarized from several hundred replies to inquiries from various sources. They have been given for the convenience and general guidance of persons concerned, with the understanding that they are informal and are without prejudice to the interest of either party to a formal hearing before the Commission. Naturally, specific cases must be decided in the light of the particular facts surrounding them.

(1) *"Employees" as defined by the act.*—(a) Municipal police officers and firemen are employees within the meaning of the act. In this act the State has divested itself of the sovereign immunity and submitted itself to the terms thereof, and it has imposed upon political sub-divisions a like obligation.

(b) Volunteer firemen of a town who are in no way controlled by the town authorities and to whom the town gives a bonus of \$18.00 per year, which sum is purely voluntary and for which no claim could be raised should the town fail to pay it, are not employees as defined in section 2 (b) of the act.

(c) Servants employed by a college or preparatory school come within the act. The term "domestic servants," exempted by section 15 of the act, means servants employed in or around a private residence.

(d) Laborers employed temporarily to do the work of unloading cars, such employment being of regular recurrence in connection with the employer's business, are within the operation of the act. The term "casual" as used in workmen's compensation acts generally refers to the nature of the work rather than to the length of the service; that is, even though an employment be temporary, it is not "casual" if it is in the usual course of the trade, business, occupation or pursuit of the employer.

(e) Elective officers of the State or of its political subdivisions do not come within the provisions of the act.

(f) Teachers, janitors, clerks and stenographers, employed by a school board, are employees within the meaning of the act.

(g) Traveling salesmen residing in Virginia and working in the State for an employer doing business in the State come within the law.

(h) Traveling salesmen working on a commission basis also come within the law. The method of payment of an employee does not alone affect his status as regards the act.

(i) Choir boys of a church receiving a nominal sum for attendance are not employees within the meaning of section 2 (b).

(j) Cooks, housegirls and butlers, employed in a hospital, are within the operation of the act and are not covered by the term "domestic servants" as used in section 15. Domestic help applies only to individuals employed in and around private homes.

(k) Pupil nurses in a hospital who receive a small allowance and board and uniforms are employees within the meaning of section 2 (b). Board and unifrom would be con-

sidered a part of the consideration for their services. [See the language in section 2 (c)].

(l) A division superintendent of schools is an employee within the meaning of the act, which includes all the State's employees save those elected by the people.

(m) Superintendents of poor houses and other employees of counties are employees within the meaning of the act.

(n) Carpenters putting up a building on a farm, and not employed regularly in farming, cannot be classified as "farm laborers."

(2) "*Employers*" as defined by the Act.—(a) City school boards are employers within the meaning of section 2 (a) of the act, and, being political sub-divisions within the meaning of section 8, cannot reject the provisions of the act relative to payment of compensation, etc.

(b) A motor car agency and repair place having more than eleven employees, including clerks, salesmen and repair men, comes within the act.

(c) An employer having from ten to fifteen men most of the time cutting and hauling wood, telegraph poles and logs to sawmill and loading on cars and working on the farm at other times, is covered by the terms of the act. The average is more than eleven employees and the major portion of the time they are engaged in other work than farming.

(d) A steamship company engaged in business as an interstate carrier and having eleven or more employees within the State, is within the operation of the act. The wording of the act exempts railroads engaged in interstate commerce and intra-state carriers whose motive power is steam, but not interstate steamship lines.

(e) An oyster packer employing eleven or more men in this business is within the operation of the act.

(f) A Y. M. C. A. employing more than eleven persons, including janitors, maids and waiters, is within the operation of the act.

(3) *Liability of principal contractor to employees of sub-contractors.*—A person conducting a lumber business letting contracts to various sawmill men and paying these sub-contractors a stipulated price per thousand feet is liable to employees of the sub-contractors in case of injury sustained in

the course of their employment. For full statement of conditions and application of section 20, see award by Commission and decision of Law and Equity Court of the City of Richmond in *Bray vs. Phaup & Tinsley*.

A provision such as that contained in section 20 is necessary to the successful operation of an act exempting employers with fewer than eleven employees. Otherwise certain lines of business may be broken up into a number of small units, each under a sub-contractor, and the provisions and purposes of the act thus evaded. The provision is intended to afford the employee certain and definite recourses. Also where a principal contractor is liable to pay compensation under this section he is given cause for action against the sub-contractor.

A principal contractor is not liable for injuries sustained by his sub-contractors, though he is liable for injuries sustained by the employees of those sub-contractors.

A general contractor constructing a building and letting out the work in whole or in part to sub-contractors is liable to the employees of these sub-contractors. The same would be true of an individual putting up the building by doing a portion of the work directly and sub-letting the rest.

An employer, a brick manufacturer, contracting with others to haul clay for him, is clearly within the operation of section 20 of the act and liable for injuries sustained in the course of this employment by the employees of the sub-contractors. The same is true of a rock-quarrying corporation letting out a part of its regular work to sub-contractors.

(4) *Medical services*.—An employer cannot be held for medical attention to an injured employee who declines to accept medical attention and the service of a fully equipped hospital provided by employer, unless the Industrial Commission, after investigating the conditions, should rule that failure to accept the same was reasonable and proper.

The wording of the act is such as to place upon the employer the duty of furnishing medical services, etc., and upon the employee the duty of accepting such services unless the conditions are exceptional.

(5) *Agreement with employee as to compensation liability*.—An employer cannot make an agreement with his employees that he will not be liable in case of accident. Such

agreements are expressly forbidden by the act (section 7) and would, moreover, amount to legal duress.

(6) *Preservation of common law defenses.*—An employer whose employees have rejected the act must continue under the act and comply with its insurance provisions in order to preserve his defenses to a common law action by said employees against him.

(7) *Torts committed by a third person.*—Acceptance of compensation from the employer for an injury at the hands of a third person does not bar the employee, or the personal representative of a deceased employee, from action against the third person. The language of section 12 has reference only to the employer of the injured man and is not intended to debar the latter from bringing suit against a third party whose act caused the injury.

(8) *Accident occurring to employee outside of State.*—When an accident occurs outside of the State, which would have been compensable had it occurred within the State, compensation is payable if the contract of employment was made within the State, if the employer's place of business is within the State and if the employee's residence is within the State. Under the wording of section 37 (a) the three conditions must concur. Compensation would also be excluded if the contract of employment is expressly made for services exclusively outside of the State. (Annual Report, 1919, Indus. Com. of Va., pp., 93 to 96.)

§ 15. Rules for appeals from the Industrial Commission.—(As prescribed by the Supreme Court of Appeals by order entered March 28, 1919). By authority and direction of section 61 of the Virginia Workmen's Compensation Act, which became a law March 2, 1918, as amended by Acts 1922, it is ordered that the form and manner of appeals from any award of the Industrial Commission of Virginia shall be as follows:

(a) The party or parties to the dispute desiring to take such appeal (hereafter called the appellant) shall file in the clerk's office of the court having jurisdiction of such appeal a petition against the other party or parties to the dispute (hereafter called the appellee), in which petition the assignments of error relied upon and the reasons therefor shall be

succinctly stated; "a copy of the award and the statements of findings of fact, rulings of law and other matters pertinent to the questions at issue, which have been filed with the record of the proceedings before the commission as prescribed by section 59 of the Act," shall be filed with the petition, which copy shall be certified by the chairman or clerk of the commission under its seal.

(b) Before the date of such filing the appellant shall serve upon the appellee a written notice of the time and place of such filing, together with a copy of such petition, and thereupon such appeal shall be granted and docketed, if within thirty days from the date of such award or within thirty days after receipt of notice to be sent by registered mail of such award, but not thereafter.

(c) The appellee may file an answer to such petition in such clerk's office within ten days from such filing, but not thereafter, except by leave of the court, or judge, and for good cause shown, a copy of which shall be delivered to the appellant or his attorney.

(d) Such appeal shall be then heard and determined as required by law, and the orders of the appellate court certified to the said commission, to be filed with its record of the proceedings. (Bulletin No. 5, Indus. Com. of Va., p. 22.)

When a hearing is held before a single Commissioner or a deputy, appeal may be taken, within seven days, to the full Commission. Awards of the full Commission are conclusive and binding as to all questions of fact, but either party may, within thirty days, appeal to the courts on questions of law. (Annual Report, 1919, Indus. Com. of Va., p. 12.)

By amendment to section 61, made by Acts 1922, p.—, an appeal may be taken in a similar manner from the decision of the circuit or corporation court to the Supreme Court of Appeals as in other civil cases.

III. VOCATIONAL REHABILITATION AND EDUCATION OF INJURED EMPLOYEES

§ 16. Establishment of division of vocational rehabilitation.—"In order to provide for the vocational training and rehabilitation of employees coming under the provisions of the Virginia Workmen's Compensation Act (see div. II., above), whose capacity to earn a living has been destroyed or

greatly impaired as a result of accident arising in the course of their employment, there is hereby created and established, under the direction and control of the Industrial Commission of Virginia, a division for vocational rehabilitation." (Acts 1920, p. 583, § 1.)

§ 17. Application for aid.—"Any such employee who may desire to avail of the benefits of this act, and who is without sufficient means to provide for his or her own rehabilitation, may apply to said division, on blanks to be prepared and furnished by the Industrial Commission of Virginia for that purpose; and said Commission shall thereupon examine fully into the merits of each case and make such order thereon as it may seem proper, giving preference, however, to the applicants whose disabilities are the greatest, and who were residents of the State of Virginia at the time of sustaining their injuries." (*Idem*, § 2.)

§ 18. Appointment of Applicants.—"The said Industrial Commission of Virginia may appoint any such applicants whom they shall consider fit subjects for rehabilitation and education beneficiaries at any suitable institution or school now established, or that may be hereafter established, either within or without the State for such period as they may determine, not to exceed the period of one year; provided, that on the special recommendation of the institution or school to which the beneficiary may be appointed, and with the approval of the Governor, the period may be further extended for not exceeding six additional months. The commission shall have power to revoke any appointment so made at any time for cause." (*Idem*, § 3.)

§ 19. How compensation determined.—"Whenever any such employee, as the result of the educational rehabilitation hereby provided shall have been enabled to regularly earn an amount equal to or greater than the amount of his or her "average weekly wage" at the date of injury, his or her right to the payment of future compensation under any existing award, save and except such awards as are provided for by section thirty-two of the Virginia Workmen's Compensation Act, shall thereafter cease and determine, and if, as a result of such educational training the employee is enabled to earn regularly a wage in excess of fifty per centum of the "average weekly wage" that he or she was enjoying at the time of injury (save

injuries provided for in said section thirty-two), the existing award and his or her rights thereunder shall be modified in accordance with the provisions of section thirty-one of the Virginia Workmen's Compensation Act." (*Idem*, § 4.)

§ 20. Appropriation.—"For the purpose of carrying out the provisions of this act for the year ending December 31, 1920, the sum of \$10,000.00 is hereby appropriated, to be paid into a separate fund to be known as the State rehabilitation fund, the same to be paid, however, from any surplus amounts now standing to the credit of the "administrative fund" of the Industrial Commission of Virginia, created by section seventy-five (c) and (d) of the Virginia Workmen's Compensation Act. A like sum shall be annually appropriated for the purpose of carrying into effect the provisions of this act from the same fund if so much is available after paying all the expenses incident and necessary to the original purposes for which said "administrative fund" was created; and if so much as \$10,000.00 is not available for that purpose in any year, then such amount, not in excess of \$10,000.00, as is so available shall annually be appropriated for the purposes of this act. It being intended hereby to utilize and apply to the purposes of this act annually the sum of \$10,000.00 from said fund if so much be available after all expenses incident to the conduct of the business of the Industrial Commission shall have been fully provided for." (*Idem*, § 5.)

§ 21. Power to accept gifts; co-operation with Federal government.—"The Industrial Commission of Virginia are hereby created and designated as trustee to receive and accept any gifts, legacies or devises that may at any time be made for the purpose of carrying out the provisions of this act or in aid thereof. Any funds so received to be paid into the State treasury and to become a part of the industrial rehabilitation fund. The said Industrial Commission of Virginia are hereby authorized and empowered to co-operate with the United States government in work of a like or similar nature as is hereby provided for, and by and with the approval of the Governor to accept the benefits of any legislation that may hereafter be enacted by the United States government having for its end the rehabilitation and training of employees injured in the course of their employment." (*Idem*, § 6.)

§ 22. Description of various forms under "Workmen's

Compensation Law."—The Commission has prepared and will furnish free of charge (see section 13, (2), above), the following standard forms, which cover many different kinds of procedure, but only a few of which, however, require constant use by employer or employee:

No. 1. *Workmen's Compensation Notice and Instructions to Employers and Employees.* To be posted by an employer at his place of business.

No. 2. *Employee's First Notice of Accident to His Employer.* This form is to be used by the employee in reporting an injury to his employer and to the Commission. It must be filed within thirty days after the accident. Notice may also be given in person or by letter.

No. 3. *Employer's First Report of Accident.* This form is for the purpose of furnishing the Commission with necessary information relative to an accident causing disability of more than seven days, and must be filed within ten days from date of accident. This form includes a supplementary report which is to be detached and forwarded to the Commissioner when the employee has returned to work.

No. 4. *Memorandum of Agreement as to Payment of Compensation.* This form is to be used in all injury cases when the employer and employee are able to reach a settlement and must be filed with the Commission and approved before it becomes binding.

No. 4-a. *Supplemental Memorandum of Agreement as to payment of Compensation.* This form is to be used when the injured employee returns to work at less wages than he was receiving before his injury. This form must also be approved by the Commission before it becomes binding.

No. 5. *Employee's Application for Hearing.* This form is to be used by an injured employee to apply for a hearing before the Commission.

No. 6. *Attending Physician's Report.* To be completed by the physician who attended the injured employee and forwarded to the Commission. Required in all cases in which disability continues for more than fourteen days.

No. 7. *Agreement of Employer and Employee as to Wages.* Required in cases in which there is dispute as to the average weekly wage or a discrepancy in the reports filed.

No. 8. *Notice of Hearing.* Used by the Commission to

notify all parties concerned of the time and place of a hearing in contested cases.

No. 9. *Notice of Award* (Approval of Agreement). Used by the Commission to notify all parties concerned when a memorandum of agreement filed with the Commission has been approved.

No. 9-a. *Notice of Award* (Approval of Agreement with Modifications). Used by the Commission when memorandum of agreement filed with the Commission has been modified by the Commission and then approved.

No. 10. *Notice of Award*. Used by the Commission in notifying all parties concerned of the award made by the Commission at a hearing in contested cases.

No. 10-a. *Notice of Award*. Form for writing awards after a case has been heard by the Commission in contested cases.

No. 11. *Special Letter*. Used in requesting information.

No. 12. *Application for a Lump Sum Award*. This form is to be used by an employee in applying for a lump sum settlement in cases where he is entitled to a specific amount of compensation.

No. 13. *Physician's Petition for Regulation of Charges for Medical Services*. This form is to be used by a physician who has attended an injured employee and whose bill is contested for any reason.

No. 14. *Notice of Insurance*. This form is to be used by an employer or insurance company and is for the purpose of notifying the Commission that the employer has complied with the insurance requirements of the act.

No. 15. *Cancellation Notice*. This form is to be used by the employer or insurance company to notify the Commission of the cancellation of the insurance policy.

No. 16. *Rejection of Provisions of the Virginia Workmen's Compensation Act* (By Employer or Employee). This form is to be used by an employer or employee rejecting the provisions of the Virginia Workmen's Compensation Act and must be filed with the Commission. If filed by the employer, a copy must be posted in a conspicuous place in his plant. If filed by an employee, a copy must be sent to the employer in a registered letter or handed to him personally.

No. 17. *Notice of Waiver of Prior Rejection of Provisions of the Virginia Workmen's Compensation Act* (by Employer or Employee). This form is to be used by an employer or an employee who has previously filed notice of rejection of the Workmen's Compensation Act.

No. 18. *Election to Adopt the Virginia Workmen's Compensation Act on the part of Employers and Employees not Otherwise Under the Act*. To be used by an employer or employee, not otherwise under the act, who elects to adopt the Virginia Workmen's Compensation Act.

No. 19. *Synopsis of Claim. Non-Fatal*. This form is to be used in making a summary of all important information after the case has been completed.

No. 20. *Employers Application for the Privilege of Paying Compensation provided in the Virginia Workmen's Compensation Act, Without Insurance*. To be used by an employer making application for the privilege of carry self-insurance. It must be filed with and approved by the Commission before becoming operative.

No. 21. *Agreement and undertaking of Employer Granted the Privilege of Paying Compensation Without Insuring*. To be filled out and signed by the employer and filed with Form No. 20 before the application for self-insurance will be granted.

No. 22. *Certificate of the Industrial Commission of Virginia as to Employer's Compliance with Section 68 of "The Virginia Workmen's Compensation Act," by Proof of Ability to Pay Compensation Direct*. Used by the Commission for the purpose of certifying that the employer has complied with Section 68 of the Act and has been granted the privilege of self-insurance.

No. 25. *Notice of New Employee Entering Employment Where Employer Has Elected to Accept, Though not Embraced in Section 15*. To be signed by the employee and filed with the Commission when the employee accepts employment with an employer who has elected to adopt the Virginia Workmen's Compensation Act though not otherwise under the act.

No. 26. *Semi-Annual Report of Self-Insurer's Pay Roll*. To be used by self-insurers in reporting to the Commission the

amount of semi-annual pay roll in order that the amount of their premium tax may be determined.

No. 27. *Examiner's Memorandum* (In cases other than death). Used by the examiner in furnishing necessary information in making up a case.

No. 28. *Examiner's Memorandum, Death Cases*. Same as No. 27, to be used in death cases.

No. 29. *Medical Report of Commission's Physician*. Used by the Commission's medical examiner in reporting on cases which have been referred to him.

No. 30. *Application for the Review by the Full Board of the Original Award*. To be used by the employer and employee in cases in which hearing was held before a deputy commissioner or one member of the Commission.

No. 31. *Record of the Proceedings of the Industrial Commission of Virginia* (Confirmation—awards, decisions, orders). This form is for the purpose of keeping a record of agreements and awards which have been made by the Commission.

No. 32. *Record of the Proceedings of the Industrial Commission of Virginia* (Approval of Agreement). Same as No. 31, to be used in cases in which agreements are approved.

No. 33. *Record of the Proceedings of the Industrial Commission of Virginia* (Not allowed). Same as No. 31, to be used in cases which are disallowed.

No. 34. *Notice of Death to Employer and to Commission* (By dependents or on their behalf). Same as No. 2, to be used in death cases.

No. 35. *Memorandum of Agreement as to Payment of Compensation and Death Benefits*. Same as No. 4, to be used in death cases.

No. 36. *Application for Hearing by the Dependents (Other than Widow) in Death Cases*. This form is to be used by dependent other than a widow in making application for hearing in death cases and provides for all necessary information to prove dependency.

No. 37. *Application for Hearing by Widow in Death Case*. Same as No. 36. To be used only by widow in making application for hearing in death cases.

No. 38. *Proof of Death, Affidavit of Employer*. This

form is to be made out, signed and sworn to by the employer in death cases.

No. 39. *Proof of Death, to be Filled out by Physician Last in Attendance on Deceased.* To be filled out, signed and sworn to by the attending physician in death cases.

No. 40. *Proof of Death: Affidavit of an Eye-Witness.* This form must be filled out, signed and sworn to by an eye-witness of the accident in death cases.

No. 41. *Proof of Death—By Undertaker.* To be filled out, signed and sworn to by the undertaker in death cases. This form must also show the amount of the undertaker's bill.

No. 42. *Synopsis of Claims: Fatal.* Same as No. 19. To be used in death cases.

No. 43. *Subpoena for Witness.* To be used by the Commission in subpoenaing witnesses to appear at a hearing in contested cases.

No. 44. *Application by an Employer, Being a Municipality or Other Political Sub-division of the State, or a Bank or Trust Company Subject to State or Federal Supervision, for Privilege of Paying Compensation Provided in Workmen's Compensation Act, Without Insurance.* This form is to be used by a municipality or political sub-division of the State in applying for the privilege of self-insurance.

No. 45. *Employers' Quarterly Report of all Accidents.* To be used by the employer in keeping a record of all accidents causing disability of more than one day and filed with the Commission at the end of each quarter.

No. 46. *Final Settlement Receipt.* This form must be used by the employer and insurance company in making final settlement for compensation paid, date the employee returned to work and the weekly wages at which he returned.

No. 47. *Expense Account.* Used by members of the Commission or their employees in making out their expense account when traveling on business of the Commission. (Annual Report 1919, Indus. Com. of Va., p. 118.)

EQUITY

(From "Hawkins' Legal Councilor," 251-2)

See *Fraud; Injunction; Marshalling Assets; Mortgages; Pleading and Its Incidents; Rescission of Contracts; Specific Performance; Sureties; Trusts and Trustees*

- § 1. Jurisdiction in general
- § 2. Ten maxims of equity
- § 3. Accidents
- § 4. Mistakes
- § 5. Discovery

§ 1. **Jurisdiction in general**—Remedies in courts of law are so limited and precise in their application and so unbending as to procedure that they are in many instances inadequate to meet out justice between man and man. This accounts for the existence of courts of equity which may be said in a measure to be supplemental to law courts, supplying suitable remedies for wrongs committed when such remedies would otherwise not exist, and in many cases stopping and even preventing the commission of wrongs. The procedure is more pliable than in the law courts, and the judgment or decree may be moulded into such form as suits the exigencies of the case.

It is a general rule that where an adequate remedy can be had at law one cannot resort to a court of equity, yet even if the remedy at law is sufficient equity will entertain jurisdiction where a multiplicity of suits at law will thereby be avoided, for frequently the rights of all may be adjudicated in a suit in equity where they could not in a suit at law, as where the rights of the parties plaintiff or defendant vary, or where different rights of the same parties are to be adjudicated.

There are certain classes of cases which are peculiarly within the jurisdiction of a court of equity, such as cases of fraud, accident or mistake, imperfect consideration, cancellation and reformation of instruments, contribution and subrogation in substitution (see *Sureties*), discovery, mortgages, rescission or cancellation of contracts, specific performance, trusts, and the like. Courts of equity with regard to all such matters will entertain jurisdiction and afford relief in proper cases, also in procuring and preserving evidence to be used if necessary in some subsequent proceeding, also in restraining

the commission or continuing of injurious acts by injunction, also where relief should be granted from considerations of public policy because of mischief which would result if the court did not interfere, as in case of contracts in restraint of trade, buying and selling public offices, and agreements founded on corrupt considerations.

Where from a relation of trust and confidence or from consanguinity the parties do not stand on equal ground in dealing with each other, as in case of a parent and child, guardian and ward, attorney and client, principal and agent, executor and legatee, administrator and distributee, trustee and beneficiary, or where the party is incapable of taking care of his own rights, as in case of idiots and lunatics, or where the forms of procedure in law courts are inadequate to the due investigation of the particulars and details of the case, as in matters of account, partition, dower, and ascertainment of boundaries, or where the relations of the parties to the suit are such that there are impediments to a legal remedy, as in cases between partners or joint tenants or in the marshalling of assets, in these and other proper cases courts of equity have jurisdiction.

§ 2. Ten maxims of equity.—Among other rules, equity observes the following ten maxims in administering justice: (1), A court of equity follows the law; (2), Where there is equal equity (or right or justice), the law must prevail; (3), He who seeks equity must do equity; (4), Equality is equity; (5), Equity (court) looks upon that as done which ought to have been done; (6), He that hath committed iniquity shall not have equity; (7), He should make satisfaction who receives the benefit; (8), He should have satisfaction who has sustained the loss; (9), Equity (court) suffers not a right to be without a remedy; (10), Equity (court) regards not the circumstance, but the substance of the act.

§ 3. Accidents.—As to accidents, frequently courts of equity will relieve against injustice arising from accident if there be no negligence or misconduct of the party seeking relief. Thus if a negotiable instrument be lost, recovery may be had thereon upon giving proper indemnity to secure the person sued from a second payment to an innocent holder thereof, that is, one purchasing it without knowing that the instrument was lost or that it had been paid.

Where the law casts a duty on a person its performance will be excused if rendered impossible by a cause operating without intervention or aid of man, that is by nature or act of God, as it is called; but one contracting expressly against natural contingencies can not exempt himself from responsibility even though the result be accidental or beyond his control—see *Accident or Act of God*.

§ 4. Mistakes.—As to mistakes, as a general rule, both at law and in equity, mistakes of law only do not furnish an excuse for wrongful action or a ground of relief from the consequences of acts done because of such mistakes. But if the act done, or the contract made, be under mistake or in ignorance of a material fact it may be either avoided or relief may be obtained in equity. The fact, however, must be a material one and it must be an efficient cause of the doing of the act or the making of the contract.

The rule applies especially where there has been a studied suppression of facts on one side, and to cases of mutual ignorance or mistake. An award of arbitrators made from mistake of law or fact on their part, if apparent on the face of the award, may be set aside. In equity a word which the parties intended to use in an instrument may be substituted for one actually used by clerical error.

§ 5. Discovery.—As to discovery, a proceeding in equity by what is termed a bill of discovery is commonly made use of in aid of the jurisdiction of a court of law to enable the party who prosecutes or defends a suit in such a court (as distinguished from a court of equity) to obtain a discovery of facts which are material to his case. Such bills of discovery were much more common in earlier practice than at present owing to changes in the law of evidence permitting the compelling of parties in interest to testify and produce books and papers in their possession or control in courts of law.

Where necessary for the securing of evidence bills of discovery are greatly favored in equity, and are sustained in all cases where some well founded objection does not exist for exercising the jurisdiction, and courts of equity, having once obtained jurisdiction for purposes of discovery will dispose of a case finally if it be proper that it be considered in a court of equity even though an adequate remedy might be obtained in a court of law. Such a bill in equity will not,

however, lie in aid of a criminal prosecution or a mandamus or a suit for a penalty.

One can in this manner have a discovery only of what is necessary to sustain his own suit, or show his own title if the suit relate to real estate, as for example, to bring to light deeds in the chain of his title under which he claims, and the purpose or the effect of the bill must not be simply to pry into the title of the defendant.

ERRONEOUS ASSESSMENTS

- § 1. Correction of erroneous assessment of lands
 - (1) Application to local board of review
 - (2) Application court
- § 2. Correction of erroneous assessment of taxes on any property
- § 3. Correction of erroneous assessment of taxes on any property or business
- § 4. Correction of erroneous assessment of levies and local taxes
- § 5. Correction of erroneous assessments made by State Corporation Commission, not already provided for
- § 6. Various forms under "Erroneous Assessments"

§ 1. Correction of erroneous assessment of lands.—

(1) *Application to local board of review*—Within 60 days after the tax books have been completed and delivered, a taxpayer may apply by petition to the local board of review for the correction of his assessment; and the Commonwealth may do the same to increase the assessment. The officers who made the assessments shall, if possible, be present. "No taxpayer who has failed, refused, or neglected, without cause shown, to file with the Commissioner of the Revenue a sworn statement of his property, shall be entitled to be heard, nor shall such valuation or assessment be reduced." (Code, §§ 2226-7.)

Where lands have been divided among several owners, an owner dissatisfied with the apportionment by the commissioner may apply to him for correction, and if one feels aggrieved by such re-assessment may apply to the local board of review to review such decision. (Code, § 2285.)

(2) *Application to court.*—One aggrieved by the assessment of his land or lots, whether he has or has not made application to the local board of review (see (1), above), may, upon 5 days written notice to the assessor and Commonwealth's attorney, apply to the court prior to February 1st of the second year after such assessment, for correction. Appended to the notice must be an affidavit of the owner or his agent that, in the opinion of the affiant, the assessment of his land or lots is above the fair market value thereof. The Commonwealth's attorney defends. The assessment is reduced or increased according to the facts. No costs are to be taxed against the applicant or the Commonwealth. Such cases have precedence of all other cases pending in the court. The owner, except where a lessee is to pay the taxes, may apply to have his assessments increased. The local board of review (see (1), above) may also apply to correct an assessment, the same as the owner, either to increase or reduce it, the Commonwealth's attorney representing them, and in Richmond, the Hustings Court, Parts I and II to have jurisdiction. (Code, §§ 2248-9.)

One aggrieved by the report or extension of taxes made by the Examiner of Records (see Code, §§ 2218-21), may have the same corrected under sections 2385-6 (see section 3, below); and the order must show that the Commonwealth's attorney defended the application, but the commissioner of the revenue need not appear as a witness unless the court thinks it necessary (Code, § 2222, as amended by Acts 1918, p. 445.)

One aggrieved by the assessment of mineral lands may likewise proceed to have the error corrected, according to sections 2386 and 2389 (see sections 3 and 4 below); on the hearing, the Commonwealth may have the assessment raised, on proper notice and proceedings. (Code, § 2237-40.)

§ 2. Correction of erroneous assessments of personal property.—After the tax books have been completed and delivered, a taxpayer may apply by petition to the local board of review (Code, § 2226) for the correction of the assessment, and the Commonwealth may apply to have it increased; with the right of appeal to court in either case (Code, § 2263).

§ 3. Correction of erroneous assessment of taxes on any property or business.—One aggrieved by such assessment of taxes on lands or other property, may, unless otherwise specifically provided, within 2 years after September 1st of the

year of assessment, and one aggrieved by a license or income tax may, within one year after such assessment, apply to court for relief. The Commonwealth's attorney defends, and the order must so state, and that the commissioner making the assessment, or his successor, was examined as a witness, and the facts provided must be certified. If satisfied the assessment is erroneous, and that the same was not caused by the applicant's failure or refusal to furnish a list of his property, real and personal, to the commissioner, on oath, as the law requires (Code, § 2306); or that the applicant is erroneously charged with a license tax, and that the same was not caused by the applicant's failure or refusal to furnish the commissioner, on oath, with the necessary information, as required by law (Code, §§ 2360, 2366), the court shall in either case, order the assessment corrected, and a refund of any excess paid; or if the assessment is too little, the court will order the payment of the proper taxes. A copy of the order is to be certified to the Auditor and State Treasurer. (Code, §§ 2385-6, and Acts 1920, p. 316, amending § 2385.) This statute does not deprive the legislature of authority by special act to refund taxes illegally collected (120 Va. 828).

An equitable owner may obtain relief under this statute, (124 Va. 142). A bill in equity (by injunction or otherwise) does not lie for the correction of erroneous assessments (121 Va. 1; 122 Va. 506; Carter's case, 102 S. E. 59).

Such order of exoneration, when delivered to the county treasurer, restrains him from collecting the erroneous amount, and if already collected, compels him to refund it, if not already paid into the treasury; if paid into the treasury, a court order entitles the claimant to a warrant on the treasury, but application must be made within one year after the date of the order. (Code, §§ 2387-8.)

§ 4. Correction of erroneous assessment of levies and local taxes.—One aggrieved by an assessment of county or city levies and other local taxes, on lands or other property, may, unless otherwise specially provided by law, within 2 years (except in case of a double assessment) after September 1st of the year of the assessment, apply to court for relief, which will order his exoneration from payment of the excessive amount, if not already paid, and if paid, its refund by the treasurer. The Commonwealth's attorney (or some attor-

ney appointed by the court, upon his failure or refusal to act) defends the application and the order must so state (or that after notice he failed or refused to defend), and that the commissioner making the assessment or his successor was examined as a witness, and the facts proved must be certified. (Code, § 2389.)

If it appears the error was caused by the neglect or carelessness of the commissioner, the court may render judgment against him for the costs; if it was caused by the applicant's failure or refusal to furnish the commissioner with the description, exhibition or list, or with the necessary information as required by law (Code, §§ 2360, 2366), the court shall refuse relief. (Code, § 2390.)

The State (if the Auditor thinks proper) may, within a year, file a petition for a re-hearing; and if the case goes against the State, an appeal may be taken. (Code, § 2391.) But the Auditor cannot proceed under this section to correct an erroneous assessment of mineral lands (115 Va. 552).

§ 5. Correction of erroneous assessment made by State Corporation Commission, not already provided for.—Erroneous assessments made by the State Corporation Commission on real or personal property or on the franchise of any corporation, the corporation, State, or any county or city, at the instance of the Attorney-General, and of the Commonwealth's attorney, may, in any case for which a remedy for the redress and correction is not otherwise provided, and within 60 days after receiving a certified copy of the assessment and ascertainment of such taxes by the commission, be corrected upon application to the Court of Appeals in the manner and upon the terms prescribed by the court. (Code, § 2392.)

§ 6. Simple remedy for correction of erroneous assessments from mistake of officer.—By Acts 1922, p.—: "Any officer charged by law with the duty of assessing taxes or levies upon land or other property, money, income or license, or any officer upon whose report such assessment is made, shall, if he is satisfied that any such assessment is erroneous and that the error was caused by his mistake, within one year from the first day of September of the year in which such assessment is made, apply to the court in which such assessing officer gave bond and qualified, or to whose clerk such bond and certificate of his qualification were returned, for the correction of such

erroneous assessments. The attorney for the Commonwealth shall defend the applications and no order correcting such assessments shall have any validity unless it is stated therein that such attorney did so defend, and the facts proved be certified.

"If the court be satisfied upon the hearing that any or all of the persons mentioned in the said application have been erroneously assessed with State taxes or local levies, or both, it may order that the same be corrected, and if application is made under section one of this act for the correction of more than one assessment at the same time, the court may dispose of any number or all of the cases in one order. The said order and the copies thereof shall be upon forms prescribed by the auditor of public accounts and shall show in detail the names of the persons against whom the assessments were made, the page, line, date and nature of the book or other assessment roll upon which such assessments were made, and shall show clearly the error to be corrected. If the assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously charged, if not already paid, and if paid, that it be refunded to him. If the assessment be less than the proper amount, the court shall order that the applicant pay the proper taxes. A copy of any order made under this section correcting erroneous assessments shall be certified by the court to the auditor of public accounts and the treasurer of the county or city.

"An order of exoneration made as aforesaid, when delivered to the treasurer, shall restrain him from collecting so much as is thus erroneously charged, or if the same has already been collected shall compel him to refund the money to the person entitled thereto, and in either case the order shall be a sufficient voucher to entitle the officer to a credit for so much in his settlement with the auditor of public accounts and the local authorities; provided, that no such order of exoneration or order refunding money shall be granted unless the application be made within the time prescribed by this act.

"If from the statements of the facts or other evidence the auditor of public accounts shall be of opinion that the order of the court granting the redress, or any portion thereof, is erroneous, he may, within one year from the time such order is made, file a petition for a rehearing of such application, or

so much thereof as relates to that portion of the order which he considers erroneous; said petition may be filed in said court or with the judge thereof in vacation, and shall be in the name of the Commonwealth, and the filing of the same shall operate as a supersedeas, and after five days' notice to the applicant, the matter shall thereupon be re-heard in said court and witnesses examined in the same manner as if no previous hearing had been had. The petition shall be presented and the hearing conducted by the attorney for the Commonwealth of the county or city.

"At the hearing the court shall make such order thereon as may be proper. And should the order of the court be against the Commonwealth, the auditor of public accounts may take an appeal to the Supreme Court of Appeals, and a supersedeas may be granted in such case in the same manner as now provided by law in cases other than cases of appeal of right. No costs shall be adjudged against the Commonwealth or the petitioner in either the trial or the appellate court."

§ 7. Various forms under "Erroneous Assessments".—

The following forms were furnished the compiler by William H. Sands, attorney at law, Norfolk, Va., with the following explanation, which vouches their authority: "These forms have been tested out by myself in cases both in the Hustings Court of Richmond and the Circuit Court of Norfolk County. They were partly drafted by my late father, Major William H. Sands, who for twenty-five years or more was Examiner of Records for the 10th Judicial Circuit, the eldest son of Alexander H. Sands, author of 'Sand's Suit in Equity', and they were partly drafted by myself and revised from time to time in order to fit the requirements of the various statutory proceedings."

No. 1. NOTICE OF APPLICATION FOR CORRECTION OF ERRONEOUS ASSESSMENT

(Code, § 2222, as amended by Acts 1918, p. 445, and § 2385, as amended by Acts 1920, p. 316.)

VIRGINIA: IN THE ————— COURT OF —————:

In the matter of the correction of erroneous assessment against
—————, reported by the Local Board of Review of Assessments of

_____, for the year 192—, and assessed by the Commissioner of Revenue of _____ District of _____.

To, _____, Examiner of Records, for the _____
 _____, Judicial Circuit.
 _____, Commissioner of Revenue, for the
 _____, City of _____.
 _____, Attorney for the Commonwealth of
 the City of _____.

Take notice, that on the _____ day of _____, 192—, I shall apply to the _____ Court of the City of _____, to correct as erroneous the assessments made by _____, for State taxes against _____, on the report of _____, Examiner of Records for the _____ Judicial Circuit, the assessments being for the year _____, and the application made for the correction thereof being pursuant to statute in such cases made and provided.

By _____
 Counsel.

NO. 2. PETITION FOR THE CORRECTION OF ERRONEOUS ASSESSMENTS AFTER ORDER CORRECTING SAME HAS BEEN ENTERED BY THE LOCAL BOARD OF REVIEW

(Code, § 2222, as amended by Acts 1918, p. 445, and § 2385, as amended by Acts 1920, p. 316.)

VIRGINIA: IN THE _____ COURT OF THE _____:

In the matter of the correction of erroneous assessment against _____, reported by the Local Board of Review of Assessments of _____, for the year _____, and assessed by the Commissioner of Revenue of _____ District of _____.

TO THE HONORABLE _____, JUDGE OF SAID COURT:

Your petitioner, _____, respectfully represents unto your honor that it is aggrieved by a certain assessment of taxes against it for the year 192—, made by _____, Commissioner of Revenue, for the _____ District of _____, and extended on the personal property books of said County; this application for correction and refund being made within two (2) years from the 1st day of September, of the year in which such assessment was made.

Your petitioner further represents as follows:

1. THAT it is a corporation duly chartered and organized under the laws of the State of _____, with its principal office, according to its charter, in _____, in said State; that its actual business office is in the City of _____, in the State of _____, in which its books, records, accounts, notes and other choses in action are kept and its accounting done, and from which its product is sold and billed and to which its bills and accounts receivable are paid; that during the year 192—, said petitioner was engaged in _____;

2. THAT in the year 192—, the Commissioner of Revenue fore-said assessed said petitioner for purposes of State and County taxation for said year on \$——, tangible personal property, Schedule B, and on \$——, intangible personal property, Schedule C, as will appear by the records in the office of the said Commissioner, and that the State and County tax thereon amounted to \$—— and has been paid;

3. THAT said assessment against said petitioner is erroneous, as will appear from an order entered by the Local Board of Review of Assessments of —— County, on the —— day of —— 192—, which sets forth how said assessment should be corrected and how said petitioner should be properly assessed, a certified copy of which order is attached to this petition as Exhibit "A" and prayed to be read as a part thereof;

4. THAT according to said order, said petitioner should be taxed on an assessment of \$——, tangible personal property, Schedule B, and on \$——, intangible personal property, Schedule C, for the said year, the tax thereon to the State amounting to \$—— under Schedule B, and \$—— under Schedule C; the County tax on the said tangible personal property amounting to \$——;

5. THAT said petitioner has paid the tax extended upon the erroneous assessments, which taxes amounted to \$—— under Schedule B, and \$—— under Schedule C, for State purposes and \$—— under Schedule B, for County purposes;

6. THAT said erroneous assessment of taxes was not caused by the failure or refusal of the petitioner to furnish the Commissioner of Revenue with the proper information under oath as required by law.

WHEREFORE, Your petitioner prays that the County of —— and the State of Virginia be made parties defendant to this petition; and that an order be entered cancelling and correcting said assessments; that the sum of \$——, illegally collected by said County and State, be refunded to the said petitioner in the manner provided by law; and that all things necessary and required by law to affect the relief herein prayed may be done herein and that the petitioner may have all such further and general relief as the nature of this case may require. And he will ever pray, etc.

By _____
Counsel.

Counsel.

**NO. 3. APPLICATION FOR CORRECTION OF ERRONEOUS ASSESSMENTS
WHEN PETITIONER IS IMPROPERLY ASSESSED AS A MANUFACTURER
AND SHOULD BE ASSESSED WITH A MERCHANT'S LICENSE
TAX**

(Va. Code 1919, § 2222, as amended by Acts 1918, p. 445, and
§ 2385, as amended by Acts 1920, p. 316.)

VIRGINIA: IN THE _____ COURT OF _____:

In the matter of the correction of erroneous assessment against _____, reported by the Local Board of Review of Assessments of _____, for the year 192—, and assessed by the Commissioner of Revenue of _____ District of _____.

TO THE HONORABLE _____, JUDGE OF SAID COURT:

Your petitioner, _____, respectfully represents unto your honor, that he has been erroneously assessed in the matter of State taxes for the year 192—, by _____, Commissioner of Revenue for the City of _____, and extended on the personal property books of the City of _____, such assessment having been so made within two years from the first day of September, prior to the date of this petition.

Your petitioner, _____, respectfully represents unto your caused by the Examiner of Records classing the petitioner as a manufacturer and as such liable to a tax on capital based on all the assets in the business, when in fact, your petitioner is and has been for the years mentioned, a commission merchant and as such has been regularly assessed with a commission merchant's license tax as fixed by law and has regularly paid same, and in addition thereto has paid regularly a tax based on the actual individual capital employed in the business, and for that reason, the assessment by the Examiner of Records for the _____ Judicial Circuit, of \$_____ for the year 192—, is erroneous, and your petitioner prays that an order be entered cancelling and correcting said assessment.

By _____
Counsel.

No. 4. ORDER FOR THE CORRECTION OF ERRONEOUS ASSESSMENTS AFTER
ORDER CORRECTING SAME HAS BEEN ENTERED BY THE LOCAL
BOARD OF REVIEW

(Va. Code, § 2222, as amended by Acts 1918, p. 445, and § 2385,
as amended by Acts 1920, p. 316.)

VIRGINIA: IN THE _____ COURT OF _____:

In the matter of the correction of erroneous assessment against _____, reported by the Local Board of Review of Assessments of _____, for the year _____, and assessed by the Commissioner of Revenue of _____ District of _____.

TO THE HONORABLE _____, JUDGE OF SAID COURT:

On motion of _____, by counsel, for the correction of erroneous assessment against said Corporation for the year 192—, extended on the personal property books of _____ for said year, it appearing to the Court by an examination of an order entered by the Local Board of Review of Assessments of _____, on the _____ day of _____, 192—, that said assessment is erroneous and should be cancelled and corrected, and it further appearing that

the information upon which said assessment was based was not withheld by said tax-payer and that the application for correction was made within two years from the first day of September, of the year in which such assessment was made, and that the assessment of \$— on tangible personal property and of \$— on intangible personal property are erroneous and should be corrected so as to read \$— on tangible personal property and \$— on intangible personal property, the court doth ORDER that the said assessments above set forth be corrected and doth DIRECT that the excess tax illegally collected thereon be refunded.

The court certifies that —, Examiner of Records for the — Judicial Circuit, who made such report to the Local Board of Review of Assessments of — and —, Commissioner of Revenue for — District of —, who extended assessments thereon were both examined touching this matter, the Attorney for the Commonwealth being present and defending said motion. The amount to be refunded on the tangible personal property assessed to be the sum of \$— and on intangible personal property assessed to be the sum of \$—.

It is ORDERED that a copy of this order be certified to the Auditor of Public Accounts of the State of Virginia, and to the Treasurer of — County.

No. 5. ORDER FOR CORRECTION OF ERRONEOUS ASSESSMENTS WHEN PETITIONER IS IMPROPERLY ASSESSED AS A MANUFACTURER AND SHOULD BE ASSESSED WITH A MERCHANT'S LICENSE TAX

(Code, § 2222, as amended by Acts 1918, p. 445, and § 2385, as amended by Acts 1920, p. 316.)

VIRGINIA: IN THE — COURT OF —:

In the matter of the correction of erroneous assessment against —, reported by the Local Board of Review of Assessments of —, for the year 192—, and assessed by the Commissioner of Revenue of — District of —.

TO THE HONORABLE —, JUDGE OF SAID COURT:

On motion of —, for the correction of erroneous assessments against the firm of —, for the year 192—, extended on the personal property books of the City of —, for said year, it appearing to the court that the said assessment against —, was based on the assumption that the firm was engaged in business as a manufacturer, and as such liable on the capital, when in fact, — is and has been for the years mentioned a commission merchant and as such has been regularly assessed with a commission merchant's license tax as fixed by law, and has regularly paid same, and in addition thereto has paid regularly a tax based on the actual individual capital employed in the business, and the assessment made by the Commissioner of Revenue is erroneous, and should be cancelled and corrected, and it further appearing that the information upon which said assessment was based was not withheld by the said tax-payer,

and that the application for correction was made within two years from the first day of September, of the year in which such assessment was made, and that the assessment of \$—— for the year 192—, is erroneous for reasons heretofore set forth and should be corrected as erroneous, the Court doth certify that for the reasons stated the said assessment on the sum of \$——, for the year 192—, is erroneous, and that the tax extended thereon should be cancelled and corrected.

The court certifies that ——, Examiner of Records for the —— Judicial Circuit, who made such report, and ——, Commissioner of Revenue for the City of ——, who extended assessments thereon, were both examined touching this matter, the attorney for the Commonwealth being present and defending said motion.

It is ordered that a copy of this order be certified to the Auditor of Public Accounts and to the Treasurer of the City of ——.

ERRORS CORRECTED IN SAME COURT

For Chapter as to, see Code, §§ 6329-35.

ESCAPE, RESCUE, AND BREACH OF PRISON

- § 1. Escape by prisoner without using force; punishment
- § 2. Aiding escape of prisoner or rescuing him
- § 3. Voluntary escapes, in case of felony
- § 4. Neglect and certain voluntary escapes, and wilful refusal to receive a prisoner
- § 5. Prisoner escaping from jail after conviction
- § 6. Prisoner escaping from jail before conviction
- § 7. Escape etc., by setting fire to jail
- § 8. Retaking a prisoner who has escaped
- § 9. Form of "description" in warrant or indictment

§ 1. **Escape by prisoner without using force; punishment.**—By the common law in force in Virginia: If a person lawfully detained in jail, prison, or custody for a criminal offense, without force effect his liberation therefrom otherwise than by due course of law, he is guilty of a misdemeanor, punishable, under statute (§ 4782), by fine or imprisonment, or by both. (H's G. & M., p. 240.) (§ 4782.)

§ 2. Aiding escape of prisoner, or rescuing him.—

"Where a person is lawfully detained as a prisoner in any jail, prison, or custody, if any person convey anything into the jail or prison, with intent to facilitate the prisoner's escape therefrom, or in any way aid such prisoner to escape, or in the attempt to escape from such jail, prison, or custody, or forcibly rescue, or attempt to rescue him therefrom, such person, if the rescue or escape be effected, shall, if the prisoner was detained on conviction or charged of felony, be confined in the penitentiary not less than one nor more than five years; and if the same be not effected, or if the prisoner was not detained on such conviction or charge, be confined in jail six months, and fined not exceeding \$500.00." (Code 1887, § 4504.)

Aiding escapes and rescuing prisoners were offenses at common law; but they are more amply provided for by the comprehensive provisions of the statute. (H's G. & M., p. 241.)

§ 3. Voluntary escapes in case of felony.—

"If any sheriff, jailor, or other officer, or any guard, or other person summoned or employed by any such sheriff, jailor, or other officer, voluntarily suffer a prisoner convicted of or charged with felony, to escape from his custody, he shall be confined in the penitentiary not less than two nor more than ten years." (Code, §4505.)

Voluntary escapes suffered by an officer or a private person having one in lawful custody, are offenses by the common law, punishable like the offense of which the party is guilty and for which he is in custody; but in Virginia, in case of a private person, which is not embraced by the above statute, the punishment is as for a misdemeanor, which by statute (§ 4782) is a fine not over \$500, or jail not over 12 months, or both. (H's G. & M., p. 241.)

§ 4. Negligent and certain voluntary escapes, and wilful refusal to receive a prisoner.—

"If any sheriff, jailor, or other officer, or any guard or other person summoned or employed by such sheriff, jailor, or other officer, negligently suffer a prisoner convicted of or charged with felony, or voluntarily or negligently suffer a prisoner convicted of, or charged with, an offense, not a felony, to escape from his custody, or wilfully refuse to receive into his custody a person lawfully committed thereto, he shall be confined in jail not exceeding six months,

or be fined not less than \$50 nor more than \$500." (Code, § 4506.)

A voluntary escape is where an officer knowingly gives the prisoner his liberty; a negligent escape is where the prisoner escapes against the will of the officer; and in the latter case the law implies negligence from the fact of the escape, and this presumption is for the defendant to rebut before he can be excused; indeed, so severe is the policy of the law in this respect that nothing but the act of God, or irresistible adverse force, is held an excuse. Deputy and *de facto* jailers are likewise responsible for an escape. (H's G. & M., p. 242.)

§ 5. Prisoner escaping from jail after conviction.—"If any person confined in jail on conviction of a criminal offense escape thence by force or violence, other than by setting fire thereto, he shall be confined in the penitentiary one year, if previously sentenced to confinement therein, or be confined in jail six months, if previously sentenced to confinement in jail; the term of confinement under this section to commence from the expiration of the former sentence." (Code, § 4507.)

§ 6. Prisoner escaping from jail before conviction.—"If any person, lawfully imprisoned in jail and not sentenced on conviction of a criminal offense, escape from jail by force or violence, other than by setting fire thereto, he shall be confined in jail not exceeding one year." (Code, § 4508.)

§ 7. Escape, etc., by setting fire to jail.—"If any person, lawfully imprisoned in jail, escape, or attempt to escape therefrom, by setting fire thereto, he shall be confined in the penitentiary not less than three nor more than ten years." (Code, § 4509.)

§ 8. Retaking a prisoner who has escaped.—Whether an officer who voluntarily suffers a prisoner to escape, or relies upon his promise to return, can take him again without further process of arrest, is a mooted question; but if he returns and puts himself again under the officer's custody, he may then be lawfully detained by virtue of the original process of arrest. (H's G. & M., p. 242.) See *Arrest*.

But when the prisoner escapes by his own wrong or through the negligence of the officer, or, it would seem, by virtue of a rescue, the officer may, upon fresh pursuit, retake him wherever he may be found, even in another county, and may break open doors for that purpose, upon demand and

refusal of admittance; and, on ground of necessity, is justified in killing a fleeing felon or any resisting offender, if otherwise unable to recapture him. Also, a justice, upon proper complaint made to him, may issue his warrant to apprehend and retake any prisoner who has escaped from lawful custody, and such warrant runs throughout the Commonwealth, and may be executed at any time and in any place. The warrant ought regularly to show on its face that the same was issued by competent authority; yet on a habeas corpus it may be proved to have been issued by competent authority. (H's G. & M., p. 243.)

§ 9. Form of "description" in warrant or indictment.—

No. 1. CONVEYING INSTRUMENTS INTO JAIL, FOR THE ESCAPE OF A PRISONER CONVICTED OF AN OFFENSE

(Code, § 4504.)

DESCRIPTION:

"feloniously did convey into the county jail of said county a [here state the things conveyed], the same being an instrument adapted to and useful for aiding prisoners to escape from prison and jail, with intent thereby to aid and facilitate the escape from custody in said jail of one E. F., who was then and there lawfully imprisoned in said jail in custody of the keeper thereof, under conviction of felony by the judgment of the circuit court of said county, for feloniously [here set forth the offense as specified in the record of conviction], by which said judgment for the felony aforesaid, the said C. D. was sentenced to — years imprisonment in the penitentiary, as appears by the records of said court, the said judgment being then in full force and in no wise reversed or made void. And the jurors aforesaid, upon their oath aforesaid, to further present, that the said E. F., being so convicted and imprisoned as aforesaid for the felony aforesaid, did, afterwards, to-wit, on the — day of — 192—, in said county, by means of said instrument, effect his escape out of and from the said jail and custody."

If the prisoner was detained on a conviction of a misdemeanor, and escape, use the above, substituting "unlawfully" for "feloniously" and "misdemeanor" for "felony"; and in any case, felony or misdemeanor, if the escape is not effected, the above will likewise suffice by commencing the "description" "unlawfully" instead of "feloniously," and in describing the offense of which the prisoner is convicted, say "felony" and "feloniously" or "misdemeanor" and "unlawfully," according as the offense is a felony or misdemeanor, and omitting the clause, "And the jurors aforesaid," &c. This and the following forms may easily be adapted to cases of imprisonment on civil process.

**No. 2. CONVEYING INSTRUMENTS INTO JAIL, FOR ESCAPE OF A PRISONER
CHARGED WITH AN OFFENSE***(Idem.)***DESCRIPTION:**

"feloniously did convey into the county jail of said county a [here state the thing conveyed]; the same being an instrument adopted to and useful for aiding prisoners to escape from prison and jail, with intent thereby to aid and facilitate the escape from custody in said jail of one E. F., who was by virtue of the lawful warrant of commitment made — day of —, 192—, by J. T., a justice for said county, then and there lawfully imprisoned in said jail in custody of the keeper thereof, upon the charge, on oath, of one A. B., of a felony, in this, that he the said C. D., on the — day of —, 192—, in said county [here insert 'description' of the offense]. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said E. F., being so imprisoned as aforesaid, for the felony aforesaid, did afterwards, to-wit on — day of —, 192—, in said county, by means of the said instruments, effect his escape out of and from the said jail and custody.

Supply here note under No. 1.

**No. 3. RESCUING, OR ATTEMPTING TO RESCUE, A PRISONER CONVICTED
OF A FELONY***(Idem.)***DESCRIPTION:**

"did feloniously and forcibly rescue [or did feloniously and forcibly, by (stating what efforts were made) attempt to rescue] and deliver from the county jail of said county, one E. F., who was then and there lawfully imprisoned [and so on, as in No. 1, but omitting 'And the jurors aforesaid,' &c.]"

**No. 4. RESCUING, OR ATTEMPTING TO RESCUE, A PRISONER CHARGED
WITH A FELONY***(Idem.)***DESCRIPTION:**

"did feloniously and forcibly rescue [or did feloniously and forcibly, by (stating what efforts were made), attempt rescue] and deliver from the county jail of said county one E. F., who was by virtue [and so on, as in No. 2, but omitting 'And the jurors aforesaid,' &c.]"

No. 5. JAILOR VOLUNTARILY SUFFERING TO ESCAPE A PRISONER CONVICTED OF FELONY
(Code, §§ 5405-6.)

DESCRIPTION:

"then being the keeper of the county jail of said county, did feloniously and voluntarily suffer and permit one E. F. to escape from his lawful custody in said jail, and to go at large out of said jail before he was entitled to be discharged therefrom, the said E. F. then and there being lawfully imprisoned [and so on, as in No. 1. but omitting 'And the jurors aforesaid,' &c.]"

By simple changes the above can be adapted to negligent escape, or to cases where the confinement is for a misdemeanor.

No. 6. JAILOR VOLUNTARILY SUFFERING TO ESCAPE A PRISONER CHARGED WITH FELONY
(*Idem.*)

DESCRIPTION:

"then being the keeper of the county jail of said county, did feloniously and voluntarily suffer and permit one E. F. to escape from his lawful custody in said jail, and to go at large out of said jail, before he was entitled to be discharged therefrom, the said E. F. then and there being lawfully imprisoned [and so on, as in No. 2, but omitting 'And the jurors aforesaid,' &c.]"

By simple changes the above can be adapted to negligent escape, or to cases where the confinement is for a misdemeanor.

No. 7. BREAKING JAIL BY A PRISONER CONVICTED OF FELONY
(Code, § 4507.)

DESCRIPTION:

"did feloniously, by force and violence, escape from and out of the county jail of said county, he the said C. D. being then and there lawfully confined and imprisoned [and so on, as in No. 1, but omitting 'And the jurors aforesaid,' &c.]"

If the prisoner is convicted of a misdemeanor, substitute "unlawfully" for "feloniously," and "jail" for "penitentiary."

No. 8. BREAKING JAIL BY A PRISONER NOT SENTENCED
(Code, § 4508.)

DESCRIPTION:

"did unlawfully, by force and violence, break and escape from and out of the county jail of said county, he the said C. D. being then and there lawfully confined and imprisoned [and so on, as in No. 2, using 'feloniously,' or 'unlawfully,' as the case may be, but omitting 'And the jurors aforesaid,' &c.]"

No. 9. ESCAPING FROM JAIL BY SETTING FIRE THERETO

(Code, § 4509.)

DESCRIPTION:

"did feloniously escape (or attempt to escape) from and out of the county jail of said county, by setting fire to the said jail, he the said C. D. being then and there lawfully confined and imprisoned [and so on, as in No. 2, but omitting 'And the jurors aforesaid,' &c.]"

ESCHEAT AND ESCHEATOR

An escheator is one who proceeds to cause lands left without will or known heirs to be forfeited to the Commonwealth. The Governor appoints one for each city and county. He acts upon an annual list of such lands by the commissioner of the revenue or upon information from any one in writing under oath. For procedure, see the statute. (Code, §§ 489, etc.)

ESTOPPEL

Where a fact has been admitted or asserted for the purpose of influencing the conduct of another or deriving personal benefit so that it cannot be denied without a breach of good faith, or where one by words or conduct wilfully or designedly causes another to believe in the existence of a certain state of things and induces him to act on that belief or to alter his own previous position, the law enforces the rule of good morals and precludes or estops the party from repudiating his representations or denying the truth of his admissions.

It is a general rule that a party to a deed is estopped to deny anything stated therein which operated upon another party as an inducement to accept and act under the deed, and a tenant is estopped to deny his landlord's title—see *Landlord and Tenant*, section 5, (3). Estoppels affect the party to the transaction and also those in privity with him, that is, those having mutual or successive relationship with him to the same rights of property.

One is estopped from alleging anything contrary to the final adjudication of a court.

If one says or does things designed to induce another to act in a particular way he cannot repudiate his conduct to the injury of the other, as where one dedicates land to public use and the public has accepted it and expended money or labor upon it and used it. One cannot even stand by and see his land improved by another without objecting and then escape paying for it, for his silence is an implied assent, and he is estopped from alleging that he did not order or contract for the improvement. (See general common law authorities.)

EVIDENCE

See Depositions

- § 1. Competency of witness in certain cases
 - (1) Competency of accused
 - (2) Competency of accomplice or person in interest
 - (3) Convicts as witnesses
 - (4) Incompetency from defect in understanding
 - (5) Competency of husband and wife to testify
 - (a) In general
 - (b) Testimony of husband and wife in criminal cases
 - (c) Communications between husband and wife
 - (6) What communications and statements privileged
 - (7) When and how incompetency of a witness objected to
- § 2. How attendance and evidence of witness obtained
 - (1) How summons issued, directed, and served
 - (2) What, if witness fails to appear
 - (3) What, if witness refuse to testify
 - (4) What, if witness is in jail
 - (5) Interpreters
- § 3. Oath or affirmation of witness; their separation
- § 4. Examinations of witnesses
 - (1) Examination in chief, or direct examination
 - (2) Cross-examination
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§ 1. Competency of witness in certain cases.—

(1) *Competency of Accused.*—By section 4778 of the Code: "In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and if so sworn and examined, he shall be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney."

But the accused cannot be compelled to give evidence against himself (Va. Const., § 8).

(2) *Competency of accomplice or person in interest.*—An accomplice, or *particeps criminis*, notwithstanding the turpitude of his conduct, is a competent witness, and upon his testimony alone a justice or jury may, yet seldom or never does, convict; it is safer always to require corroboration.

But the confessions of an accomplice, made after the offense was committed, are not competent against the prisoner, even though a previous conspiracy and combination between the accomplice and the prisoner to commit the offense has been proved.

An accomplice who "turns State's evidence," has no right to a pardon or even any indulgence on account of his disclosure, yet in a proper case, a dismissal will usually be entered in his favor. (H's G. & M., p. 585.)

The rule that interest does not disqualify, prevails, also, in a civil case, except "in an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony:

and in any such action or suit, if such adverse party testifies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence." (Code, §§ 6208-9.)

For disqualification of person prosecuted for gambling or unlawful gaming to testify against witness for State, see *Gambling or Gaming*, section 16. For disqualification in case of bribery, see *Bribery*.

If one party, in a civil case, require the other to testify in his behalf, and he refuse, the justice, judge, etc., may dismiss his warrant or proceeding, as to the whole or any part thereof, or strike out and disregard his plea, answer, or other defense, or any part thereof, as justice may require. (Code, § 6213.)

(3) *Convicts as witnesses*.—By section 4779 of the Code: "Conviction of felony or perjury shall not render the convict incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit."

(4) *Incompetency from defect in understanding*.—Every person must be so possessed of his understanding as to be able to retain in memory the events of which he is to testify and to discern between right and wrong; and a witness wanting such a share of understanding, whether from idiocy, lunacy, infancy, or intoxication, is, while the deficiency exists, disqualified to testify. Children under 14 years of age, and deaf and dumb persons, are *prima facie* incompetent, and so the person offering such a witness must first show the sufficiency of his understanding. (H's G. & M., p. 587.)

(5) *Competency of husband and wife to testify*.—(a) *In general*.—By section 6210 of the Code: "Husband and wife shall be competent witnesses to testify for or against each other in all cases, civil and criminal, except as otherwise provided."

(b) *Testimony of husband and wife in criminal cases*.—By section 6211 of the Code: "In criminal cases husband and wife shall be allowed, and subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense

committed by one against the other, but if either be called and examined in any case as a witness in behalf of the other, the one so examined shall be deemed competent, and subject to the exception stated in the next section, may be compelled to testify against the other under the same rules of evidence governing other witnesses. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by the prosecuting attorney. In the prosecution for a criminal offense committed by one against the other, each shall be a competent witness except as to privileged communications."

(c) *Communications between husband and wife.*—By section 6212 of the Code: "Neither husband nor wife shall, without the consent of the other, be examined in any case as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted."

(6) *What communications and statements privileged.*—Communications, written or oral, made to an attorney at law or his interpreter, agent, or clerk, for the purpose of professional advice or aid, or to him as a witness, are, on grounds of public policy, forever privileged from disclosure; and it is the client's privilege, and may be waived by him, but not by the attorney. Communications between party and witness are, for like reasons, privileged. But not so as to clergymen, physicians, surgeons, telegraphic agents, and operators. Upon a like principle of public policy, secrets of state, police secrets, communications between state officials, proceedings of grand jurors and petit jurors, and communications offensive to public morals, are, in certain cases, privileged from disclosure. (H's G. & M., p. 588.)

By section 4781 of the Code: "In a criminal prosecution other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statements made by him as a witness upon a legal examination, unless such statement was made when examined as a witness in his own behalf."

(7) *When and how incompetency of a witness objected*

to.—An objection to the competency of a witness should be made as soon as he presents himself to be sworn, or as soon thereafter as the objection is discovered. The witness is put on his *voir dire*, and examined by the party objecting, and evidence *aliunde* may be adduced, the court deciding upon his competency. But when the court has once pronounced the witness competent, he cannot be again examined before the jury touching his competency. (H's G. & M., p. 588.)

§ 2. How attendance and evidence of witness obtained before a justice.—In a criminal case, if the prosecution is commenced by a warrant of arrest, the statute provides that the justice, "in the same warrant, may require the officer to whom it is directed to summon such witnesses as shall be therein named to appear and give evidence on the examination" (see *Justice of the Peace*, div. V.), by which it seems witnesses may be summoned in such cases by mere word of mouth. But if the officer is not so directed, or if the process commencing the suit is a summons, witnesses are properly summoned as directed below. And in case the production of a book, writing or document is desired, the clerk is directed to issue a *subpoena duces te cum*—see *subpoena Duces Tecum*. (Code §§ 6219-2, 6237.)

(1) *How summons issued, directed, and served.*—A summons for a witness to attend before a justice, on behalf of a plaintiff or the defendant, may be issued by any justice of his county or corporation, by the clerk of the court thereof, or, in a criminal case, by the attorney for the commonwealth, directed to a constable, sheriff, or sergeant of any county or corporation within the state (Code, §§ 6021, 3352, 4969), and by him served as a notice is served under section 6041 of the Code—see *Notices*.

A witness duly summoned is privileged from arrest, except for felony or actual breach of the peace, while attending or going to or from the place of trial. (Code, § 2823; H's G. & M., p. 469.)

(2) *What, if witness fails to appear.*—If a witness fails to appear before a justice pursuant to the summons, he is subject to the following penalties and processes:

(a) The justice shall, unless he show a reasonable excuse therefor within ten days after being summoned to state such excuse, fine him a sum not exceeding \$5, for the use of the

party on whose behalf he was summoned—see Code, § 6021.

(b) The justice may issue a summons or rule against him, returnable at a certain time, to show cause why an attachment should not be issued against him for contempt in disobeying his lawful subpoena, and if he still fails to appear, the justice may issue an attachment to bring the delinquent before him to answer for the contempt. Indeed, in very flagrant cases, the attachment may issue without the previous rule. Upon the return of the rule or attachment, the justice may imprison him not exceeding ten days (but the defendant may appeal), or discharge him as may be proper—see *Contempts*.

(c) The justice may make a special report of the matter to the circuit or corporation court, or to the judge thereof in vacation, and such court or judge shall, after service of notice or rule to show cause against it, and if none be shown, fine him not exceeding \$20, to the use of the party for whom he was summoned, and such court or judge may proceed by attachment to compel him to attend and give evidence, at such time and place as the court or judge may deem fit—see Code, §§ 6220, 4969.

(3) *What, if witness refuse to testify.*—If, pursuant to summons, a witness attends before a justice engaged in the trial of a case, but refuses to be sworn or to give evidence therein, he may be dealt with as follows:

(a) The justice, for the contempt of his court, may at once fine him not exceeding \$20, or imprison him not exceeding ten days, or punish him by both fine and imprisonment; but the party may appeal from such sentence—see *Contempts*.

(b) The justice may make a special report of the fact to the circuit or corporation court; or the judge thereof in vacation, and such court or judge may commit the witness to jail, there to remain until he shall, in custody of the jailer, give evidence as required of him. (Code, §§ 6220, 4969.)

(4) *What, if witness is in jail.*—If the witness be in custody of the law, and thus not at liberty to obey a subpoena, his attendance may nevertheless be procured by a special writ for the purpose, called *habeas corpus ad testificandum*, granted by any circuit or corporation court, or any judge thereof in vacation, upon a petition therefor, stating the case, the ma-

teriality of the witness, and his confinement in jail. (Code, § 5861.)

(5) *Interpreters.*—They may be sworn truly to interpret, when necessary. (Code, § 6223.)

§ 3. Oath or affirmation of witness; their separation.—If the witness be found competent, he is sworn or affirmed, according to religious scruples (Code, § 278). This is usually done in this form: "You do solemnly swear (or *affirm*) that the evidence you shall give in the matter now here pending between the Commonwealth (or C. C.), plaintiff, and D. D., defendant, shall be the truth, the whole truth, and nothing but the truth; so help you God!" The justice may order the witnesses to be examined out of hearing of each other (Code, § 4843). (H's G. & M., p. 589). One before whom witness is examined may administer oath (Code, § 6222.)

§ 4. Examinations of witnesses.—

(1) *Examination in chief, or direct examination.*—The witness having been sworn, the party producing the witness proceeds to examine him, which is called his direct examination, or examination in chief, wherein it is not allowed to ask leading questions i. e., questions suggesting the answer desired, or embodying a material fact and admitting of an answer by a simple "yes" or "no"; or falsely assuming facts to have been proved, or particular answers to have been given. But leading questions are permitted, even in direct examination, when the witness appears to be hostile to the party producing him, or in the interest of the other party, or unwilling, or of weak memory, or when the subject of inquiry must necessarily be particularly specified, or when such a mode of questioning is logically consistent with the fair and honest development of the case. Indeed, the allowing of leading questions is in the discretion of the court. (H's G. & M., p. 589.)

(2) *Cross-examination.*—When a witness has been examined in chief, the other party has a right to cross-examine him, and to put leading questions; but this right usually extends only as to the subject of his examination in chief, and questions as to matter collateral thereto are rarely permitted by the court, the entire matter resting in its discretion. Cross-examination is powerful in discovering truth. By means of it the situation of the witness with respect to the parties and the question at issue, his interest, motives, prejudices, and

means of obtaining correct and certain knowledge of the facts as to which he bears testimony, the manner in which he has used these means, his power of discernment, memory, and description—all are fully investigated and ascertained, and submitted to the consideration of the jury, who have, all the while, observed his demeanor in testifying. If one's own witness prove adverse, he may be examined according to rules of cross-examination, and contradicted (Code, §§ 6214-5.) (H's G. & M., p. 590.)

(3) *Re-examination*—After cross-examination, the party who called the witness has a right to re-examine him as to any statement, relevant or not, made by him on cross-examination, but not as to new matter.

A witness may be reached for re-examination or for re-cross-examination in the discretion of the court. (H's G. & M. p. 590.)

§ 5. What questions witness may refuse to answer.—Our constitution (§ 8), affirming an already fundamental principle of the common law, declares that no man can "be compelled to give evidence against himself." Thus, a witness may refuse not only to give evidence that might criminate himself, but to disclose any link in the chain of testimony tending to establish his guilt; and whether his answer to any particular question would have that tendency, is for the witness himself to say upon his oath and without explanation, unless, indeed, it clearly appears to the court that he is mistaken, when he will be compelled to answer. But evidence wrongly extorted from the witness, though competent in the pending trial, cannot be used against him in any subsequent trial. The privilege, however, is his own, of which the court will usually advise him, and which he alone can claim or waive. The right is not waived by having testified before a grand jury, justice, or coroner; yet, in any case, if the witness, being informed of his privilege, chooses to answer, he is bound to answer everything relative to the transaction; and if he claims his privilege and declines to answer, the law raises no presumption against him. But where the statute of limitation interposes a bar, or where the witness is indemnified from prosecution, as in case of duelling, unlawful gaming and bribery, he cannot claim the privilege, and will be compelled to testify. As to exposure to disgrace, a witness will be com-

pelled to answer questions, when such questions are material to the issue; but not so when collateral and irrelevant, and asked under the license of cross-examination for the purpose of discrediting the witness, for every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers; and why should the very foundation of justice be polluted by an ever-flowing stream of scandal? (H's G. & M., pp. 599-1.)

§ 6. How witness impeached or sustained.—

(1) *By disproving his statement.*—The rule that a witness may be discredited by disproving the facts stated by him, does not apply to collateral matters brought out on cross-examination, except that he may be contradicted as to his motives, interest, or bias. But where an attempt is made to discredit a witness by showing malice on his part, he may show that he has before made the same statement. The favorite maxim, *falsum in uno, falsum in omnibus* (false in one thing, false in all things) does not hold good except in cases where the falsehood goes to the core of the witness' testimony. (H's G. & M., p. 591.)

(2) *By impeaching his general character for truth.*—A witness may be discredited by evidence attacking his character for truth and veracity, but the enquiry must be limited to his general reputation for truth, and not descend to particular facts; and it is not enough merely to state what "others say," for those others may be but few. The regular mode of doing this is to inquire of the witness, first, if he knows of the party's general reputation for truth and veracity in the community in which he lives; and, then, if he answers in the affirmative, what that reputation is; and then, if his answer is adverse, the further and final question is put, as to whether from such knowledge he would believe him on oath. The witness may then be cross-examined as to his means of knowledge and grounds of opinion, or his general character may be attacked, and that of the other sustained by fresh evidence of good character. (H's G. & M., p. 592.)

(3) *By proof of self-contradiction.*—The credit of a witness may also be impeached, not only by self-contradiction on cross-examination, but likewise by proof that he has made statements out of court, contrary to what he has testified at

the trial, but only as to matters relevant to the issue, and after having designated the time, place, and persons involved in the supposed verbal statement or identified the letter or other writing by showing it to the witness. And, as a general rule, proof of statements out of court, is not admissible to corroborate evidence, yet otherwise, where an attempt has been made to prove malice on the part of the witness. H's G. & M., p. 592.) He may be contradicted by prior inconsistent writing. (Code, § 6216.)

§ 7. Rules of evidence.—

(1) *Rule as to burden and sufficiency of proof.*—The *onus probandi*, or burden of proof, as to any fact, whether in a civil or criminal case, lies upon the party who substantially asserts the affirmative of the issue, and against whom judgment or verdict should be given, supposing no evidence were offered on either side. In a civil suit, both parties—standing on the same footing, and with equal rights and advantages; in the eye of the law—enter the contest with about equal advantages and so in many cases, when the right dubious and there is no presumption in favor of either party, a mere preponderance of proof carries the verdict, it being sufficient that the scales barely tip by the weight of evidence. But in a criminal prosecution, the Commonwealth, with unlimited command of means, with an attorney usually of authority and capability, regarded as a public officer speaking semi-judicially, and with a prior solemn finding of a grand jury in his hand, enters the contest with an attitude of tranquil majesty, in striking contrast to that of the prisoner, struggling for life or liberty. To meet this inequality, the law, humanely presuming every one to be innocent, requires the accused to be acquitted unless this presumption is overcome by proof of his guilt beyond all reasonable doubt. The doubt however, that acquits should be grave, serious, reasonable, not a mere possible, fanciful, or imaginary doubt. (H's G. & M., p. 693.)

(2) *When witness to testify to facts; when, to opinions.*—As a general rule, in civil and criminal cases, a witness must depose, not his opinions or conclusions, but only facts within his own knowledge, which he may disclose, as it lies in his memory, yet he need not speak with absolute certainty, it being sufficient that the fact is impressed on his memory, even though

his recollection does not rise to positive assurance. Thus, a witness cannot be asked whether he acted with great care in the discharge of a certain duty; whether a certain person could have left a room when the witness was asleep in it; whether a certain person "looked excited," or "looked downcast"; or whether the deceased showed an intention to kill the prisoner or the defendant was in imminent danger; whether certain conduct indicated adultery or recent sexual intercourse; whether a certain house was a bawdy house; whether certain conduct was negligent or honest; whether in a particular case there was danger to life; whether certain injuries could have been avoided; whether a person was so intoxicated as to be incapable of forming an intent, or such like questions.

An exception to the rule is, when the opinion necessarily involves certain facts, or is the mere shorthand rendering of the facts; or when it is not convenient, practicable, or possible to state the facts in the concrete. Thus, even a non-expert witness may give his opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, conduct, friendliness, hostility, value, time, distance, dimension, handwriting, and the like. Also, persons of skill, called experts, may depose their opinions on questions of science, skill, trade, or others of the like kind, yet not as to matters of common notoriety and within the ordinary experience of the court. (H's G. & M., p. 594.)

(3) *Rules as to witness refreshing his memory.*—A witness must testify to his own knowledge and recollection, yet he may refresh or assist his memory by memoranda, notes, or entries in three cases: (1) where, after inspecting the writing, by whomsoever made, the witness can speak as to the facts from his own recollection, yet the writing should be produced for the other party in cross-examination; (2) When the witness, though not recalling the fact, yet has a present recollection that at a prior time when he had a perfect recollection of the fact, he committed it to writing, the writing is then admissible in evidence; (3) when he neither recollects the fact nor recognizes the writing as a memorandum of it, but where the witness, on seeing the writing, can state that it would not have been made had not the fact in question been true, the writing then goes in as evidence. (H's G. & M., p. 595.)

(4) *Rule as to relevancy of evidence.*—It is a rule governing the production of testimony in civil as in criminal cases, that the evidence offered must respond to some material allegation, and be confined to the point in issue. This rule excludes all evidence of collateral facts, or those incapable of affording any reasonable presumption as to the matter in dispute; for such evidence, besides tending to distract, mislead, or prejudice the jury, is without notice to the adverse party, who therefore may not be prepared to rebut it; and the court will exclude it as irrelevant. But in civil cases sometimes, and in criminal cases more often, general good character is relevant. Thus evidence of general good reputation of a party as to any particular trait is admissible in an action or suit involving or directly affecting that trait of his character. So, likewise, in criminal prosecutions, general good reputation of the accused as to peacefulness, honesty, veracity, chastity, or the like, is relevant to show it unlikely that he committed a crime questioning that trait. But where one's character is thus voluntarily put in issue, evidence of general bad character as to the trait in question is admissible in rebuttal. In cases of assault or homicide, when self-defense is the defense, the particular character of the party injured or killed, as to ferocity, brutality, vindictiveness, or excessive strength, is relevant. (H's G. & M., p. 505.)

(5) *Best evidence obtainable is required.*—It is a general rule governing the production of evidence, in both civil and criminal issues, that every fact must be proved by the best evidence of which the fact in its nature is susceptible, or, in other words, by primary evidence; while, on the other hand, evidence which carries on its face that other evidence remains behind, is secondary and carries with it the presumption of fraud, and is therefore not admissible. But this rule does not require all, nor, indeed, the strongest proof of a fact. The most frequent application of this rule relates to the substitution of oral for written evidence. This is not permitted: (1) when the law requires the instrument to be in writing—e. g., records, public documents, official examinations, deeds of conveyance, promises to pay the debts of another, and other writings embraced by section 5561 of the Code, known as the “statute of parol agreements”; (2) when the parties have put their contract in writing; (3) when the existence of a writing is disputed,

the same being material either to the issue between the parties, or to the credit of witnesses—and not merely the memorandum of some other fact—for the whole contents of an instrument may have a different effect from the statement of a part. And, as a general rule, “contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.” If the writing does not fall within either of these three classes, there is no ground for excluding oral evidence, for such evidence is as near the fact testified to as the writing, as in cases of receipts, letters, the record of one’s birth or death, and the like.

Also, the rule requiring primary evidence is subject to exceptions, where general convenience or the nature of the facts to be proved requires—thus: (1) A marriage, an agency, a partnership, the official character of a public officer, the corporate character of a corporation, summaries of voluminous facts or documents, inscriptions on fixed tablets, mural monuments, gravestones, surveyor’s marks, and the like, are ordinarily proved orally; (2) in case of public records, registers and entries, the law authorizes copies in lieu of originals; and (3) secondary evidence may be received in cases where the primary proof is out of the party’s power, as when a writing is lost, destroyed, in the hands of the opposite party, or otherwise non-producible, but such fact must first have been satisfactorily shown to the court. (H’s G. & M., p. 596.)

For Code, statutes, resolutions, journals, ordinances, copies of deeds, or records or papers in public offices, etc., as evidence, see Code, §§ 6189-6200.

For how lost or illegible records, etc., re-entered or restored, see Code, §§ 6201-4.

For authentication of foreign records, deeds or papers, see Code, §§ 6205-7.

For books on the laws of other states, etc., as evidence, see statutes, section 6.

(6) *Rule as to hearsay evidence; exceptions thereto.*—Hearsay evidence, on account of its intrinsic weakness, its want of persuasive power, and the frauds that are practiced under its cover, is generally not admissible in any case, civil or criminal.

(a) *What is and what is not hearsay evidence.*—Hearsay

evidence is evidence whose value depends, not entirely upon the credibility of the witness himself, but in part upon the veracity and competency of another person whose statements the witness repeats. But every repetition of the statements of another is not hearsay, but oftentimes is original and independent evidence, and therefore admissible—e. g., (1) information—true or false—on which one has acted, when the inquiry is whether he acted prudently, wisely, or in good faith, and general reputation, notoriety, or character, in cases where the issue is hearsay; (2) expressions of bodily or mental feeling, when the existence or nature of such feelings is the subject of inquiry; (3) declarations accompanying and qualifying an act done, as part of the *res gestæ* (the thing done)—e. g., declarations contemporaneous with the acts of associates, co-conspirators, partners, agents, and the like.

(b) *Exceptions to rule excluding hearsay evidence.*—Most of the cases in which hearsay evidence is admissible have more frequent application in civil cases—e. g., (1) declarations of persons deceased, made *ante litem motam* (before the action brought) touching ancient rights, in matters of public and general interest; (2) declarations touching ancient possessions, contained in ancient document, purporting to constitute part of the transaction, coming from the proper custody, and vouched for by a correspondent possession; (3) declarations of near relatives, on questions of pedigree, relationship, birth, marriage or death; (4) declarations and entries of a deceased person against his interest when made; and (5) the testimony of witnesses subsequently dead or absent, where the party against whom it is produced had on a former occasion a right to cross-examine; but these last two exceptions do not obtain in criminal cases.

Dying declarations are applicable to cases of homicide only, and are admissible when made by the person injured, touching the cause of his death, while actually *in extremis* (in extremity or dying) and conscious that he is so, under a sense of pending death, without any expectation or hope of recovery. (H's G. & M., pp. 598-9.)

(7) *Rule as to admissions and confessions.*—An admission, whether in the express language, or implied from the silence or conduct of a person, is admissible in evidence against

him as well as those identified in interest with him—e. g., a co-plaintiff, co-defendant, co-partner, co-conspirator, or the like; and if the admission, whether of law or fact, express or implied, true or false, has been acted upon by others, it is conclusive against the party making it, in all cases between him and the person whose conduct he has thus influenced. But admissions made, to be without prejudice, or under duress, or under the faith of a pending compromise, are not receivable in evidence.

The confession of an accused, if free and voluntary, is very persuasive, but it must be received with caution, and is inadmissible if it appears to have been extorted by the flattery of hope or the torture of fear. That it is voluntary is a condition precedent to its admissibility, which the prosecution must show when it is questioned. The whole of the confession must be proved, but the justice exercises his discretion as to the credit to be given to it. If it follow speedily upon a threat, or promise, or even an exhortation to confess by one having authority over the accused, as a justice, constable, prosecutor, or the like, it is inadmissible, as is any subsequent confession, unless the prosecution show that the original influence has ceased to operate. (H's G. & M., p. 599.)

(8) *Rule as to so-called circumstantial evidence.*—Circumstantial evidence, in its popular sense, is evidence of facts not immediately connected with the fact in controversy, but standing around it more or less remotely and tending to prove it. More strictly speaking, all evidence is circumstantial in some degree—the only difference between direct and circumstantial evidence being that the former is more immediate and has fewer links in the chain of connection between the premises and the conclusion; but the term “circumstantial” has been appropriated in its proper sense, by our highest appellate court, to designate a particular kind of evidence, and so is a fixture in our legal nomenclature. Circumstantial evidence is therefore legal evidence and though it must be acted upon with the utmost caution, yet it is oftentimes of the most satisfactory character. Thus, in the language of our supreme court: “Where all the circumstances of time, place, motive, means, opportunity, and conduct concur in pointing out the accused as the perpetrator of the crime,

it must produce a moral if not an absolute certainty of his guilt." And the strength of circumstantial evidence is further emphasized by the several convictions of capital offenses sustained on such testimony. (H's G. & M., p. 599.)

EXECUTION

(See "Burks' Pleading & Practice" (new ed.), same title.)
See *Homestead and Other Exemptions; Indemnifying Bond; Interpleader; Judgment Lien; Sheriffs, Sergeants, Constables, etc.*; "Unlawful Detainer," under *Justice of the Peace*, div. III; "Warrants for Small Claims", under *Justice of the Peace*, div. I.

- § 1. When to issue
- § 2. What levied on
- § 3. How levied
- § 4. Lien of execution
- § 5. Against corporations
- § 6. On joint judgments
- § 7. Where judgment for benefit of another than plaintiff
- § 8. Return of officer
- § 9. Re-sale if purchaser fails to comply with terms
- § 10. When *venditioni exponas* (that you expose to sale) may issue
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- § 14. Quashing executions
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- § 17. Enforcement of lien by suit
- § 18. Effect of change of parties by death, etc.
- § 19. Forms under "Execution"

§ 1. **When to issue.**—By special order, an execution (or "*feri facias*," as it is technically called) may issue during the term of the court (Code, § 6500); but regularly they issue afterwards, without order or instruction (Code, § 6480). though the attorney may direct its delay or on what property

to be levied, and control the proceedings thereafter. Where issued within a year, others may issue with 10 years, but if not issued within a year, the judgment must be revived—see *Judgments*, section 4.

Other or additional executions may issue, at creditor's costs (Code, §§ 6497, 6516).

§ 2. What levied on.—By statute (§§ 6485-6487) it may be levied "as well on the current money and bank notes as on the goods and chattels" of the debtor, except such as are exempt (see *Homestead and Other Exemptions*), but this does not include bonds, notes, and other *choses* (or thing or right) in action, on which, however, the execution is a lien (see § 4, below). If the officer takes another's property, the remedy is, (1) against the sheriff, either individually or on his official bond; or (2) against the creditor for the money derived from the sale; or (3) against the purchaser, in detinue or trover and conversion; or (4) on the indemnifying bond; or (5) by interpleader; or (6) by injunction, where the property has a special value from affection or sentiment attached to it. Property held under fraudulent loans, etc., (see *Conveyances*, section 18), or under a conditional sale or reservation of title or lien, where the writing is not recorded (see *Conditional Sale or Reservation Title or Lien*); or under a fraudulent or voluntary (i. e., without consideration) conveyance,—may be levied on; but in the latter case, unless the fraudulent intent is capable of clear proof, it would be better to file a suit to set aside the conveyance. But property under a deed of trust or mortgage cannot be taken and sold under a deed of trust in order to reach any surplus that might remain after satisfying the deed of trust creditor, for such an interest is not only equitable (Code § 5157), but also contingent, and might result in the sacrifice of the property; the remedy is in equity.

By a new section (6486), inserted by the Revisors of the Code 1919, the common law has been changed as follows: "Tangible personal property subject to a prior lien, or in which the execution debtor has only an equitable interest, may nevertheless be levied on for the satisfaction of a *feri facias*. If such prior lien be due and payable, the officer levying the *feri facias* shall sell the property free of such lien, and

apply the proceeds first to the payment of such lien, and the residue, so far as necessary, to the satisfaction of the *fiery facias*. If such prior lien be not due and payable at the time of sale, such officer shall sell the property levied on subject to such lien."

As to goods of a tenant "on premises leased or rented," see "Distress Warrant," under *Justice of the Peace*, div. IV.

As to growing crops, see *Sheriffs, Sergeants, Constables, etc.*, section 13.

As to what is real estate, see *Fixtures; Landlord and Tenant*, section 5, (10); and *Real Estate*, section 2.

An execution against one of several co-partners may be levied upon the partnership effects; but only his undivided interest can be sold, the purchaser becoming a tenant in common with the other partners, and realizing nothing until the partnership debts are paid.

An unascertained interest in a deceased person's estate cannot be levied on and sold. (4 Min. Inst., 1011-18.)

§ 3. How levied.—See *Justice of the Peace*, div. I., section 3, (14), (f). And by a new section (6490), inserted by the Revisors of the Code 1919: "An officer into whose hands an execution is placed to be levied, may, if need be, break open the outer doors of a dwelling-house in the day-time after having first demanded admittance of the occupant, in order to make a levy, and may also levy on property in the personal possession of the debtor if the same be open to observation."

§ 4. Lien of execution.—By section 6485 of the Code, an execution "shall bind what is capable of being levied on only from the time it is delivered to the officer to be executed. The lien of a writ of *fiery facias* under this section, on what is capable of being levied on but is not levied on under the writ on or before the return-day thereof, shall cease on that day; provided, however, that property levied on, on or before the return-day may be advertised and sold within a reasonable time thereafter, and the lien given by this section may also be enforced after the return-day of the writ by proceedings under section 6503 and following of this chapter (as to interrogatories) if such proceedings be commenced before that day." A levy on or before the return-day is necessary to complete this lien.

As to lien on things not capable of being levied on (i. e., intangible property, in other words, all other personal property that is not visible or tangible, such as debts due by bond, note, or otherwise, except, of course, such as is exempt by law), section 6501 says: "Every writ of *feri facias* shall, in addition to the lien it has under section 6485, on what is capable of being levied on under that section, be a lien, from the time it is delivered to a sheriff or other officer to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return-day of the said writ become possessed or entitled, and which from its nature, is not capable of being levied on under the said section, except such as is exempt under the provisions of chapter 274 (see *Homestead and Other Exemptions*), and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall not affect him, unless he had notice thereof at the time of the assignment, or payment, as the case may be." And by section 6502: "The lien acquired under the preceding section shall cease whenever the right of the judgment creditor to enforce the judgment by execution, *scire facias*, or action ceases, or is suspended by a forthcoming bond being given and forfeited, by supersedeas, or by other legal process." Hence, this lien continues even after the debtor's death (31 Grat. 525, 527).

To fix the exact commencement of the lien, section 6488 provides: "Every officer shall endorse on each writ of *feri facias* the year, month, day, and time of day, he receives the same. If he fail to do so, the judgment creditor may, by motion, recover against him and his sureties, jointly and severally, in the court in which the judgment was rendered, a sum not exceeding fifteen per cent. upon the amount of the execution." If several executions are in his hands, they are to be satisfied in the order in which they were delivered, and if delivered at the same time, they are to be satisfied ratably; but preference is given to creditors giving an indemnifying bonds required by the officer (Code, § 6489).

§ 5. Against corporations.—Same 'as against natural persons (Code, § 6481).

§ 6. On joint judgments.—The executions are joint (Code, § 6481).

§ 7. Where judgment for benefit of another than plaintiff.—See Code, § 6482.

§ 8. Return of officer.—By section 6491 of the Code: “Upon a writ of *feri facias*, the officer shall return whether the money therein mentioned is or cannot be made; or if there be only part thereof which cannot be made, he shall return the amount of such part. With every execution under which money is recovered, he shall return a statement of the amount received including his fees and other charges, and such amount, except said fees and charges, he shall pay to the person entitled. In his return upon every execution, the officer shall also state whether or not he made a levy of the same, the date of such levy, and the date when he received such payment or obtained such satisfaction upon the said execution; and if there be more than one defendant, from which defendant he received the same. Upon the return of said writ of *feri facias* by the officer to the clerk’s office or to the court to which it is returnable, it shall be the duty of the clerk thereof to enter the return of said officer on the execution book or judgment docket wherein said execution is entered, as the case may be, giving the date thereof.” See also, *Sheriffs, Sergeants, Constables, etc.*, section 9.

If the execution is not levied before the return-day, he has no authority afterwards to receive money in his official capacity. But if he levies on or before, he may sell and receive the money within a reasonable time thereafter—see section 4, above.

As to how and when an officer receiving money to make return and to pay the net proceeds, section 6515 of the Code says: “An officer receiving money under this chapter shall, within thirty days thereafter, make return thereof to the court or the clerk’s office of the court in which the judgment is, or, if it was rendered by a justice, to the circuit court of the county or to the corporation court of the city, or to the clerk’s office of either in which such justice resides; and for failing so to do shall be liable as if he had acted under an order of said court. After deducting from said money a commission of five per centum and his necessary expenses and costs, including reasonable fees to counsel, he shall pay the net proceeds, and he and his sureties and their representatives shall be liable therefor, in like manner as if the same had been made under

a writ of *feri facias* on the judgment, returnable at the end of said thirty days."

§ 9. Resale if purchaser fails to comply with terms.—See Code, § 6492.

§ 10. When venditioni exponas (that you expose to sale) may issue.—See Code, §§ 6493-4. This writ is now needed only where more than a "reasonable time" after the return-day has elapsed without a sale—see section 4, above.

§ 11. Officer to pay surplus to debtor.—See Code, § 6495.

§ 12. Officer not required to go out of county or corporation to pay money.—See Code, § 6496.

§ 13. New execution when recovery on indemnifying bond.—See Code, § 6498.

§ 14. Quashing executions.—By section 6499 of the Code: "The motion to quash an execution may, after reasonable notice to the adverse party, be heard and decided by the justice who issued the execution, or the circuit court of the county or the corporation court of the city in which such justice resides, and in other cases by the court whose clerk issued the execution, or by the judge thereof in vacation; and such court or judge, on the application of the plaintiff in the motion, may make an order staying the proceedings on the execution until the motion be heard and determined, the order not to be effectual until bond be given in such penalty and with such condition, and either with or without surety, as the court or judge may prescribe. The clerk from whose office the execution issued, or the justice rendering the judgment, as the case may be, shall take the bond and make as many copies of the order as may be necessary and endorse thereon that the bond required has been given; and a copy shall be served on the plaintiff in the execution and on the officer in whose hands the execution is."

If an execution is in any material particular irregular or variant from the judgment as to amount, parties, etc., it may be quashed. Thus, where judgment is entered against several, though at different times, the execution against some will be quashed (18 Grat. 13).

§ 15. Proceedings by interrogatories.—See Code, §§ 6503-8.

§ 16. Garnishment proceedings.—By section 6509 of the Code: "On a suggestion by the judgment creditor that,

by reason of the lien of his writ of *fiery facias*, there is a liability on any person other than the judgment debtor, a summons may be sued out of the clerk's office of the court in which the judgment is, or, if rendered by a justice, may be issued by a justice, or sued out of the clerk's office to which an execution issued thereon has been returned as provided in section six thousand and thirty, against said person; and a copy thereof shall be served on the judgment debtor as well as on said person, or, if he be a non-resident, he shall be proceeded against by publication, according to the provisions of section six thousand and sixty-nine, unless the summons was sued out from a justice, in which case, there shall be no order of publication. The return-day of such summons, when sued out from the clerk's office, may be to the next term of the court although more than ninety days after the date thereof, but if there be publication against a non-resident judgment debtor who does not appear in the proceedings, there shall be no judgment against a garnishee prior to the term of the court after the completion of the order of publication, and when issued by a justice, such summons may be made returnable before any justice of the county or corporation in which the same issued, and shall be made returnable within sixty days at some certain place within such county or corporation to be named in such summons, and within the magisterial district wherein such judgment debtor resides at the time of the service of such summons."

By section 6510: "The person summoned shall be examined on oath. If it appear on such examination that there is any such liability on him, the court or justice may give judgment against him for any amount found due the execution debtor, and order him to deliver any estate for which there is such liability, or pay the value of such estate, to any officer whom it may designate; and the levy of an execution on such order shall be valid, although levied by such officer."

By section 6511: "If such person, after being served with the summons, fail to appear, or if it be suggested that he has not fully disclosed his liability, the proceedings shall be according to sections sixty-three hundred and ninety-nine and sixty-four hundred, *mutatis mutandis*, except that when the summons is before a justice, he shall proceed without a jury."

By section 6512: "Any person, summoned under section

sixty-five hundred and nine, may, before the return-day of the summons, deliver and pay to the officer serving it, what he is liable for; and the officer shall give a receipt for, and make return of, what is so paid and delivered."

By section 6513; "Unless such person appear to be liable for more than is so delivered and paid, there shall be no judgment against him for costs. In other cases, judgment under sections sixty-five hundred and ten and sixty-five hundred and eleven may be for such costs, and against such party, as the court may deem just."

For garnishment in attachment proceedings, see "Attachments," under *Justice of the Peace*, div. II. See *Homestead and Other Exemptions*.

§ 17. **Enforcement of lien by suit.**—See Code, § 6514.

§ 18. **Effect of change of parties by death, etc.**—If there is but one party, plaintiff or defendant, and he dies before execution issued, the judgment must be revived before execution can be sued out. If there are several, and one dies, the judgment survives as to the survivors, and upon the suggestion of the death, in the execution book, and in the writ of execution, execution may issue at once, for or against them, and if the suggestion be false, the defendant may move to quash the execution. On the other hand, as to the administrator or executor, the judgment may be revived and execution issued by an action or *scire facias* on the judgment or by mere motion, without notice. If the death occur after the execution issued, it is levied without regard to the death, as if all were living. (Code, §§ 6165, 6168, 5762; 4 Min. Inst. 689.)

§ 19. **Forms under "Execution."**—

NO. 1. FORM OF AN EXECUTION

(2 Bart. L. Pr. p. 795).

The Commonwealth of Virginia,

To the sergeant of the city of ——— (or *sheriff of the county of* ———), greeting:

You are commanded that of the goods and chattels, current money, and bank notes of D. D., late in you bailiwick, you cause to be made the sum of ——— dollars, with interest thereon, to be computed after the rate of ——— per centum per annum, from the ——— day of ———, 192—, until payment, which C. C. late in our ——— court of the ——— of ———, has recovered against him;

also _____ dollars and _____ cents, which by the same court were adjudged to C. C. for his cost by him about his suit in that behalf expended, whereof the said D. D. is convicted as appears to us of record; and that you have the same before the judge of our said _____ court, at the court-house thereof, on the _____ day of _____ next, to render unto the said C. C. of the debt, interest and costs aforesaid, and have then there this writ,

Witness: J. N., clerk of our said court, at the court-house aforesaid, the _____ day of _____, 192—, and in the _____ year of the commonwealth.

J. N., Clerk.

If the judgment shows that it is "Upon an instrument waiving the homestead," or "Upon a claim against which the homestead cannot be demanded," the statement should be endorsed upon the execution—Code, § 6551.

NO. 2. NOTICE OF LIEN ON PROPERTY NOT CAPABLE OF BEING LEVIED ON

(Code, § 6501; Pollard's Code Biennial 1920, p. 320.)

To whom it May Concern: Take notice that C. C. obtained a judgment in the _____ court of _____, on the _____ day of _____, 192—, against D. D., for the sum of _____ dollars, with lawful interest thereon from the _____ day of _____, 192—, until paid, and _____ dollars costs; that a writ of *feri facias* issued on said judgment on the _____ day of _____, 192—, returnable to said court on the _____ day of _____, 192—, and was delivered unto the hands of the sheriff of _____ on the _____ day of _____, 192—; that such writ of *feri facias* is a lien from the time it was delivered into the hands of the officer to be executed upon all personal estate of or to which the said judgment debtor is now or may afterwards and before said return of said writ become possessed or entitled; and all persons who are now or may hereafter become indebted to the said judgment debtor are hereby given notice of the said writ of *feri facias*, and the fact that they will be affected by such notice, and held responsible accordingly for any payment made to said judgment debtor, or any one for him after receipt of his notice.

Given under my hand this _____ day of _____, 192—.

C. C., by A. T., p. q.

NO. 3. NOTICE OF MOTION TO QUASH EXECUTION

(Code, § 6499.)

To Mr. P. P.:

Take notice, that on the _____ day of _____, 192—, at _____, Va., in _____ county, I shall move before J. T., a justice of said county (or before the circuit court of said county, or before the honorable R. T., judge of the circuit court for said county in vacation), to quash a certain execution issued by the said justice (or by

the clerk of the said court), on the — day of —, 192—, in favor of P. P., against the goods and chattels of D. D., for the sum of — dollars, with interest thereon from the — day of —, 192—, till paid; and \$— costs, because [here assign reasons]; and for other reasons then and there to be assigned.

D. D., by his attorney.

Nos. 4—11. RETURNS OF OFFICERS.—[See Nos. 20 to 26, under *Sheriffs, Sergeants, Constables*, etc.]

EXECUTORY LIMITATION, OR FUTURE ESTATE

- § 1. Definition; distinguished from remainder
- § 2. Classes of executory limitations, or future estates
 - (1) Springing limitations
 - (2) Shifting or conditional limitations
 - (3) Future interests in personal property
- § 3. Rule against perpetuities
- § 4. Effect on limitation, of life tenant's power of disposal
- § 5. Transfer of executory limitations and their liability for debts

§ 1. Definition; distinguished from remainder.—An “executory limitation” is the creation of a future estate in real or personal property by deed or will, other than a remainder (see Code, §§ 5147, 5188). (If created under the statute of uses (§ 5155) it is often designated an executory or future use; if under the statute of wills (§§ 5227-8), it is generally called an executory devise; and if under the statute of future grants, (§ 5147), it is sometimes styled an executory grant; but they all are executory limitations).

An estate is never an executory limitation, if it can take effect as a remainder, vested or contingent. To a remainder (see *Remainder*, section 1) a preceding estate is necessary; in an executory limitation, none is needed, but the estate may spring up at any future period not too remote (see section 3, below), or may shift from one to another; and if there be a preceding estate it is not necessary that the executory limitation should vest when such estate ends as is required in a remainder.

An executory limitation is by virtue of statutes authorizing transfers by deed or will (Code, §§ 5147, 5155, 5227-8), and

statutes expressly authorizing such conveyances (Code, §§ 147, 5188); while a remainder may be created not only by statute, but also by the common law, with statutory modification that it shall (when once created) "in no case fail for want of a particular estate to support it" (§§ 5153-4). There are other differences. (1 *M's Real Prop.*, §§ 821-2, 831-7.)

§ 2. Classes of executory limitations, or future estates.

—There are three classes: (1) *Springing limitations*.—In wills these are called executory devises; in deeds, springing limitations, or springing uses or grants, according as they arise under the statute of uses (§ 5155) or of future grants (§ 5147). A springing limitation or executory devise is a deed or will of a future freehold (fee simple or life) estate without any or a sufficient preceding estate, to arise or spring upon the occurrence of a future event; as, a deed to A and his heirs, to the use of B and his heirs, or a deed or will to A and his heirs, from and after the marriage of B with C., the estate springing up on B's marriage; or a deed to A and his heirs, to the use of B for 21 years, then to the use of the first unborn son of B and the heirs of his body.

These, like in the case of remainders, are either vested or contingent with similar distinctions as to their nature and their being made to "children," "heirs," or other class of persons, or as "alternative" or "cross" limitations, but the statute abolishing the Rule in Shelley's case does not apply—see *Remainder*, sections 2 to 6.

(2) *Shifting or conditional limitations*.—A shifting or conditional limitation, is where there is a substitution of a freehold (fee simple or life) estate vested in one person by an estate in another; as a deed to A and his heirs, to the use of B and his heirs, or a will or deed to A and his heirs, but on the marriage of B with C, then to B and his heirs; or a deed or will to A and his heirs, and in case A should die under 25 (or, in case B should die leaving no issue at his death, or any other condition), then to C and his heirs; or a will to A and his heirs, but if he die without lawful heirs, to B (A's brother, nephew, or other blood relative) and his heirs (see section 5151 at end of section 3, below, section 5152 abolishing the rule in Shelley's case not applying). A remainder could not be after a vested fee simple, nor as against a preceding estate, but it had to await its regular expiration.

As shifting limitations arise after the preceding estate has prematurely divested upon a contingency or condition subsequent, they are always contingent, and therefore conditional limitations. The preceding estate may be either a present estate in possession, a vested or contingent remainder, or a vested or contingent executory limitation, either springing or shifting; as, a deed or will to A in fee (an estate vested in possession), but if A die under 30, then to B in fee; or a deed or will to A for life, remainder after his death to B in fee (a vested remainder), but if A die under 30, then to C in fee, or to A in fee after the death of B (a vested springing limitation), but if A die under 30, then to C in fee; or a deed or will to A's oldest son (unborn) in fee (a contingent springing limitation), but if he die under 30, to B in fee. If the conditional limitation for some cause fails, the previous disposition may still take effect. (1 M's Real Prop., §§ 823-9, 839, 884.)

(3) *Future interests in personal property.*—The statute (§ 5147) says, "Any estate may be made to commence in *futuro*" (in the future) by deed or will; and this includes personal property (and a term for years in land, which is not real but personal property), in which remainders may be created, provided the things are not necessarily consumed in the use, such as provisions, of which the first taker becomes the absolute owner. As to property intended for use and not production, as, agricultural implements and work cattle, the first taker is answerable for such only as are in existence at the end of his holding; as to productive property, as, brood mares, sheep, etc., the first taker must keep up in kind, except as to those destroyed by disease or accident without his fault; and money, whether given directly, or the proceeds of property sold, the first taker must account for at the end of his holding.

Formerly if the first taker were expressly given a life estate, with full power of disposition, the remainder was void; but now the above statute (§ 5147) provides, if the instrument, expressly or impliedly, confers "a power upon the life tenant in his lifetime or by will to dispose absolutely of said property, the limitation in remainder over shall not fail or be defeated, except to the extent that the life tenant shall have lawfully

exercised such power of disposal"; but a deed of trust or mortgage, unless there be a sale thereunder is not such a disposition. (1 M's Real Property, § 830.)

§ 3. Rule against perpetuities.—This rule requires that every contingent executory limitation, of real or personal estate, in order to be valid, shall be so limited that it must necessarily vest in interest, if at all, with a life or lives in being, and ten months (the utmost period of gestation, or pregnancy, when such is actually the case—Code, §§ 5151, 5271), and 21 years thereafter (the age when one thus born after the end of the lives in being might first validly transfer the property). If the time is not measured by lives, but by a definite or indefinite number of years, then it should not be longer than 21 years. A life is "in being," though unborn, if he be in the mother's womb at the date of the creation of the interest, which in case of a will is the date of the testator's death, or in case of a deed, the date of its delivery.

The possibility that a limitation may never vest matters not, provided if it vests at all it must vest within the prescribed period.

The rule applies only to contingent interests, i. e., those either limited to persons not ascertained or not in being, or limited upon the occurrence of an uncertain event. Hence the rule does not apply, where the limitation must take effect, if at all, immediately upon the death of life tenants in whom the previous estate is vested (102 Va. 528).

Examples of limitations violating the rule against perpetuities: A deed or will to first son of A who attains the age of 25 or 21 and 10 months—otherwise of 21 only—A having no son of that age at the delivery of the deed or at his death.

Examples not violating the rule: A will to such of the testator's grandchildren as shall attain the age of 21 (87 Va. 548). And in case of the phrase dying without heirs, issue, etc., by section 5151 of the Code: "Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring or descendant, or other relative, shall be construed a limitation, to take effect when such person shall die not having such heir or issue, or child or offspring,

or descendant, or other relative, as the case may be, living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it."

§ 4. **Effect on limitations, of life tenant's power of disposal.**—Where there was an absolute power of disposal, formerly the limitation over was void for repugnancy to the first estate and uncertainty of the property to go to the second taker. It is otherwise now by statute (5147) as to "the limitation over in remainder," except so far as the power, expressly or impliedly given, has been lawfully exercised by the life tenant—see *Remainder*, section 9.

§ 5. **Transfer of executory limitations and their liability for debts.**—The same as in case of remainders—see *Remainder*, sections 7 and 8.

EXPRESS COMPANIES

See Common Carrier and Corporations

- § 1. Creation of express companies; costs
- § 2. Foreign express companies
- § 3. When railroad, steamships, etc., not liable
- § 4. Illegal to rent out tonnage by freight trains—see Code, § 4032
- § 5. What express company shall receive for transportation
- § 6. Penalty for violation of foregoing sections
- § 7. Taxation of express companies—see *Taxation and Tax Bill*
- § 8. Where suits brought against express companies—see *Corporations*, section 11
- § 9. On whom and how process or notice served—see *Corporations*, section 12
- § 10. Acknowledgments of writings—see *Corporations*, section 14
- § 11. General laws applicable to express companies
- § 12. Miscellaneous laws as to express companies

§ 1. **Creation of express companies costs.**—They are chartered like other public service corporations (other than railroads), such as telegraph, telephone, canal, or turnpike company, etc.—see *Corporations*, section 4; for costs, see section 5.

§ 2. Foreign express companies.—Every foreign company, association, person, or partnership obtaining from a railroad, steamboat or steamship company here, privilege to do an express business in this State, must first execute a power of attorney appointing the Secretary of the Commonwealth its statutory agent for purpose of suits and service of process. Such express company, etc., must deposit bonds (U. S., State, or certain city bonds), worth at least \$50,000, with the Treasurer of the State, to secure them against liability, and for this purpose he may sell the bonds. (Code, §§ 4027-30.)

§ 3. When railroad, steamships, etc., not liable.—They are not liable where the express company, etc., has made the above deposit of bonds. (Code, § 4031.)

§ 4. Illegal to rent out tonnage by freight trains.—See Code, § 4032.

§ 5. What express company shall receive for transportation.—They must receive and deliver all articles and things offered for transportation at all landings and stations on the line or route covered by their contract with the transportation company, at which the latter keeps an agent, and receives and discharges freight and passengers. (Code, § 4033.) They are common carriers (20 Grat. 264).

§ 6. Penalty for violation of foregoing sections.—Fine not under \$100 (Code, § 4034). This penalty is not a fine for an offense against the State, but a mere forfeiture recoverable by civil warrant or by action or motion as mere fines are recovered generally—see Code, §§ 6015, 2543 (as amended by Acts 1920, p. 319); 88 Va. 296; 90 Va. 297, 778; 10 Va. L. J. 941; *Justice of the Peace*, div. VII, section 3.

§ 7. Taxation of express companies.—See *Taxation and Tax Bill*.

§ 8. Where suits brought against express companies.—See *Corporations*, section 11.

§ 9. On whom and how process or notice served.—See *Corporations*, section 12.

§ 10. Acknowledgments of writings.—See *Corporations*, section 14.

§ 11. General laws applicable to express companies.—The general provisions of the Code as to corporations in general (§§ 3776-3848, and Acts 1920, pp. 489, 494, 565, amending

§§ 3780, 3846, 3847, respectively); the general provisions of the Code as to public service corporations (§§ 3881-3903, and Acts 1920, pp. 411, 20, amending §§ 3885, 3897, respectively); and the chapter of the Code as to transportation companies generally (§§ 3904-35, and Acts 1920, pp. 234, 618, 20, amending §§ 3905, 3918, 3935, respectively,—apply to express companies—See *Corporations and Common Carrier*.

§ 12. Miscellaneous laws as to express companies.—For miscellaneous sections of the Code and Acts as to express companies, see § 1220 (penalty for allowing food to become contaminated in transit); §§ 3933-4 (lien for charges and sale therefor; § 4004 (maintenance of office by railroad); §§ 4632, 4635, 4637, 4654 as amended by Acts 1918, p. 578, and Acts 1920, pp. 110, 593 (as to delivery of intoxicating liquors): §§ 4632-5, 4638, as amended by Acts 1918, p. 578, and Acts 1920, p. 110 (as to transportation of intoxicating liquors); and § 1728 (transportation of dead body).

EXTORTION

See *Abduction*

- § 1. Extorting money, etc., by threats; how punished—see *Blackmailing*
- § 2. Extortion by officers, how punished
- § 3. Fraudulent issue of fee bills, how punished
- § 4. Form of "description" in warrant or indictment

§ 1. Extorting money, etc., by threats; how punished.—See *Blackmailing*.

§ 2. Extortion by officers, how punished.—"If any officer, for performing an official duty for which a fee or compensation is allowed or provided by law, knowingly demand and receive a greater fee or compensation than is so allowed or provided he shall be fined not exceeding \$50." (Code, § 4514.)

§ 3. Fraudulent issue of fee bills, how punished.—"If any person, authorized by law to charge fees for services performed by him, and issue bills therefor, fraudulently issue a fee bill for a service not performed by him, or for more than

he is entitled to, he shall be fined not exceeding \$500;" and shall forfeit his office, and be forever incapable of holding office. (Code, §§ 4515, 4517.)

§ 4. Form of "description" in warrant or indictment.—

No. 1. EXTORTING MONEY BY THREATENING TO INJURE THE CHARACTER OF ANOTHER

(Code, § 4406.)

DESCRIPTION:

"feloniously did threaten to injure the character of the said A. B., by then and there feloniously threatening to accuse him, the said A. B., of the crime of adultery (or other offense, whatever it may be), and did then and there, by means of the said threat, feloniously extort money, to-wit: the sum of ten dollars, from him, the said A. B."

No. 2. EXTORTING MONEY THREATENING TO ACCUSE ANOTHER OF A CRIME

(*Idem.*)

DESCRIPTION:

"feloniously did threaten to accuse him, the said A. B., of having committed a crime, in this, that he, the said A. B. [here insert description of the crime], and did thereby feloniously extort money, to-wit: the sum of five dollars, from him, the said A. B."

No. 3. EXTORTING MONEY BY THREATENING TO INJURE THE PROPERTY OF ANOTHER

(*Idem.*)

DESCRIPTION:

"feloniously did threaten to injure a certain storehouse, the property of the said A. B., by setting fire to and burning the same, and did then and there, by means of the said threat, feloniously extort money, to-wit: the sum of one hundred dollars, from him, the said A. B."

FARMER'S CO-OPERATIVE MARKETING ACT

§ 1. Purpose of Act.—The "declaration of policy" or purpose, as stated by the act, is to "promote, foster, and encourage the intelligent and orderly marketing of agricultural products through co-operation, and to eliminate speculation

and waste, and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done, and to stabilize the marketing of agricultural products." (Acts 1922, p. —, § 1.)

§ 2. Scope of Act.—"Agricultural products" include "horticultural (i. e., pertaining to gardens and orchards), viticultural (pertaining to grapes), forestry, dairy, live stock, poultry, bee, and any other farm products."

"An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling, or supplying to its members of machinery, equipment, or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein." (Id., §§ 2, 4.)

§ 3. Classed as non-profit association.—"Associations organized hereunder shall be deemed non-profit, inasmuch as they are not organized to make profits for themselves, as such, or for their members, as such, but only for their members as producers." (Id., § 2.)

§ 4. How association organized.—Any 5 or more persons engaged in the production of agricultural products may form a non-profit, co-operative association, with or without capital stock, under the provisions of this act. This is done by filing articles of incorporation setting forth:

- "(a) The names of the association.
- (b) The purposes for which it is formed.
- (c) The place where its principal office in this State is located.
- (d) The period, if any, limited for the duration of the association.
- (e) The number of directors thereof, which must not be less than five (5), and may be any number in excess thereof, their names and addresses and the term of office of such directors.
- (f) If organized without capital stock, whether the property rights and interest of each member shall be equal

or unequal; and if unequal, the articles shall set forth the general rule or rules applicable to all members by which the property rights and interest, respectively, of each member may and shall be determined and fixed; and this association shall have the power to admit new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or the vote of two-thirds of the members.

(g) If organized with capital stock, the amount of such stock and the number of such shares into which it is divided and the par value thereof. The capital stock may be divided into common and preferred stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the nature and extent of the preference and privileges granted to each.

"The articles must be subscribed by the incorporators and acknowledged by them before an officer authorized by the law of this State to take and certify acknowledgment of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this State; (see *Corporations*, section 4), and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State, and other places, as *prima facie* evidence of the facts contained therein, and of the due incorporation of such association. A certified copy of the articles of incorporation and by-laws, and amendments, shall also be filed with the director of the division of markets, of the State department of agriculture, and the director of extension division of the State agricultural college." (Id., §§ 3, 8.)

All other marketing concerns, hereafter organized, are forbidden under penalty, to use "co-operative" in their name, unless they have complied with this act. (Id., § 21.)

§ 5. Filing fees; annual license fees.—"For filing articles of incorporation, an association organized hereunder with capital stock shall pay such fees as conform to the general law governing corporations (see *Corporations*, section 5, (3)), but where organized without capital stock shall pay \$10; and for filing an amendment to the articles, \$2.50."

"Each association organized hereunder shall pay an annual license fee of \$10 but shall be exempt from all license taxes, or taxes upon capital stock or reserve funds held by it." (Id., §§ 30, 31.)

§ 6. Amendments to articles of incorporation.—"The articles of incorporation may be altered or amended at any regular meeting or any special meeting called for that purpose. An amendment must be approved by two thirds of the directors, and then adopted by a vote representing a majority of all the members of the association, except as herein otherwise provided. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this State." (Id., § 9.)

§ 7. By-laws.—"Each association incorporated under this act, must, within 60 days after its incorporation, adopt for its government and management a code of by-laws, not inconsistent with the powers granted by this act. A majority vote of the members or stockholders, or their written assent, is necessary to adopt such by-laws. Each association under its by-laws may also provide for any or all of the following matters:

(a) The time, place, and manner of calling and conducting its meetings.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail, or by both, and the conditions, manner, form, and effects of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensations, and duties and terms of office of directors and officers; time of their election, and the mode and manner of giving notice thereof.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization, and membership fees, if any; the manner and method of collection of the same, and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association, the charge, if any,

to be paid by each member or stockholder for services rendered by the association to him, and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(i) The number and qualifications of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time, and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which, and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association, and mode, manner, and effect of the expulsion of a member; manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member the board of directors shall equitably and conclusively appraise his property interest in the association, and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal." (Id., § 10.)

§ 8. Members.—“(a) Under the terms and conditions prescribed in its by-laws, an association may admit as members, or issue common stock, only to persons engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent part of the crop raised on the leased premises.

(b) If a member of a non-stock association be other than a natural person, such member may be represented by any individual, associate, officer, or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a

member or stockholder of any other association or associations organized hereunder." (Id., § 7.)

§ 9. Powers.—"Each association incorporated under this act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, harvesting, preserving, drying, processing, canning, packing, storing, handling, or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any non-member.

(b) To borrow money and to make advances to members.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire, and to hold, own, and exercise all rights or ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or such other property as may be provided in the by-laws.

(f) To buy, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association, or incidental thereto.

(g) To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly, and in addition, to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights, powers, and privileges granted by the laws of this State to ordinary corpora-

tions, except such as are inconsistent with the express provisions of this act; and to do any such thing anywhere." (Id., § 6.)

§ 10. Marketing contract.—“(a) The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto, and pay over to its members the resale price, after deducting all necessary selling, overhead, and other costs and expenses, including interest or dividends on preferred stock, not exceeding eight per centum per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest or dividends not exceeding eight per centum per annum upon common stock.

(b) The by-laws and the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premium for bonds, expenses and fees in case any action is brought upon the contract by the association; and any such provision shall be valid and enforceable in the courts of this State.” (Id. § 17.)

For a person knowingly to induce any member or stockholder to break his marketing contract, makes him liable to the association for the damages sustained by the breach, or maliciously and knowingly to spread false reports about the finances or management of the association, makes him liable not only for the actual damage thereby sustained, but also for a penalty of \$500 for each such act. (Id., § 25.)

§ 11. Application of general corporation laws.—“The provisions of the general corporation laws of this State, and all powers and rights thereunder (see *Corporations*, section 8), shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this act.” (Id., § 28.)

§ 12. Extent of liability of members.—"Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof." (Id., § 14 (c).)

§ 13. Associations to which this act shall not apply.—This act does not apply to any existing corporation, association or organization of farmers, heretofore organized or any exchange now in existence, unless it adopts the provisions of this act. (Id., § 32.)

§ 14. Other provisions of the act.—For definitions of terms used in the act, see § 2; general and special meetings, § 11; directors, § 12; election of officers, § 13; stock, membership certificates, voting, limitation on transfer of ownership, § 14; removal of officer or director, § 15; referendum, § 16; purchasing business of other associations, payment, and stock issued, § 18; annual reports, § 19; conflicting laws not to apply, § 20; interest in other corporations or associations, § 22; contracts and agreements with other associations, § 23; associations heretofore organized may adopt the provisions of this act, § 24; associations are not in restraint of trade, § 26; if any section of act unconstitutional, others not affected thereby, § 27; associations in other states authorized to do business in this State, § 29.

FEES OF OFFICERS AND WITNESSES

See *Justice of the Peace*, div. X (as to "Costs before a Justice")

- § 1. Secretary of Commonwealth and Clerk of House of Delegates
- § 2. Surveyor
- § 3. Notaries
- § 4. Justices of the peace
- § 5. Commissioner in chancery
- § 6. Clerks of circuit, appellate, and other courts
- § 7. Clerks of circuit, appellate and other courts in chancery cases

- § 8. Clerks of Supreme Court of Appeals; to whom cost of printing record is charged; when case dismissed if cost of printing not paid; amount taxed for printing to be paid into treasury—see Code, § 3486
- § 9. For what service clerks not to charge
- § 10. Who pays clerk's fees; fee bills, etc.
- § 11. Sheriffs, sergeants, constables, orlers, and coroners
- § 12. Commonwealth's attorney
- § 13. Jailor
- § 14. Witnesses
- § 15. Commission to consider compensation of officers

§ 1. Secretary of Commonwealth and Clerk of House of Delegates:

For a testimonial	\$1 50
For a copy of any paper, if on one sheet	1 00
And for each sheet after the first	75
For issuing a commission to a commissioner in another State	5 00
For issuing a commission to each notary and inspector appointed by the Governor	3 00
For making a requisition for a fugitive from justice demanded of another State	2 00
For issuing a warrant for the arrest of a fugitive demanded by the executive authority of another State	2 00
And for filing in his office any paper required by law to be filed, the same fee as is allowed by law for recording similar papers; but no fee shall be charged for filing a notice of candidacy or other paper required by law of a candidate for any office. All such fees shall be collected by the Secretary of the Commonwealth, and shall be paid by him into the treasury of the State.	
The Clerk of the House of Delegates, for a copy of an Act of Assembly, if on one sheet	1 00
And for each sheet after the first	75
(Code 1887, § 3478.)	

§ 2. Surveyor:

- (1) For all surveying actually done, for the first one hundred poles, or any less distance, long measure, per pole

0 01

After the first one hundred poles, long measure, per pole	\$ 0 00½
(2) For calculating the quantity of less than six courses or lines	50
(3) When land is divided, for calculating each division of less than six courses	50
(4) For every course or line more than six	03
(5) For making a plat of six courses, or less	50
(6) For every course more than six	03
(7) For recording a plat and certificate, if not more than six courses	50
(8) For every course above six	03
(9) For a copy of a plat and certificate, where there are not more than six courses	50
(10) For every course above six	03
(11) For making an entry	50
(12) For a copy of an entry	15
(13) For every search, where no copy is required	10
(14) For giving a receipt for a warrant or any other paper	15
(15) For traveling to the place of surveying and re- turning, per mile	05

If surveying be done at different places, on the same tour, the mileage shall be apportioned among the different surveys according to their distance from the residence of the surveyor or deputy and each other, so that the surveyor shall not receive more than five cents a mile for going and returning for any one trip. (Code, § 3479.)

§ 3. **Notaries.**—See *Notary Public*.

§ 4. **Justice of the peace.**—See *Justice of the Peace*, div. X.

§ 5. **Commissioner in Chancery.**—By section 3482 of the Code: "For services which might be performed by notaries, the like fees for like services; for any other service such fees as the court by which the commissioner is appointed may from time to time prescribe not exceeding one dollar where less than an hour is employed, and if more than an hour be employed not exceeding the rate of one dollar for each hour.

"A commissioner returning a report shall annex thereto an affidavit, that he was diligently employed not less than—

hours in performing the services for which the fees stated at the foot thereof are charged. Until such affidavit is made, no bill shall be made out for said fees. A commissioner shall not be compelled to make out or return a report until his fees therefor be paid, or security given him to pay so much as may be adjudged right by the court to which the report is to be returned, or, by the judge thereof in vacation, unless the court or judge see cause to order it to be made out and returned without such payment or security, and shall so order"; and by section 3483 he is required to state at the foot of a report returned by him, "the fees therefor, to whom charged, and if paid, by whom."

§ 6. **Clerks of circuit, appellate and other courts.**—By section 3484 of the Code, as amended by Acts 1920, p. 800:

- "(1) Where a writing is admitted to record under chapters 132, 210, and 211 of the Code of 1919, for everything relating to it, except the recording in the proper book, to-wit: for receiving proof of acknowledgments, entering orders, endorsing clerk's certificate, and where required, embracing it in list for commissioners of the revenue \$0 50
- (2) For recording a plat of not more than six courses or lines, or for a copy thereof 50
- (3) For each other distinct line or course above six 05
- (4) For recording in the proper book such writing, and all matter therewith (except plats), or for recording anything not otherwise provided for, for every twenty words 03
- (5) In lieu of the said allowance of three cents for every twenty words, the clerk may for recording in the proper book elect to charge the following specific fees, to-wit:
- Where the writing is a deed of trust, mortgage, or is a conveyance of real or personal estate 1 00
- For recording a will a specific fee of 50
- Or in lieu thereof, for every twenty words 03
- (6) For swearing witnesses and entering in the order book, or minute book, each order in relation to the proof of a will which is admitted to record without contest, and copying such orders on the will 75

- | | |
|---|---------|
| (7) If there be an order committing decedent's estate to an officer, for entering and copying such order and the orders of appraisement | \$ 0 50 |
| (8) If any personal representative qualify, for swearing him and his surety, making out bond, entering and copying on the will the order granting probate or administration, making one copy of such order for representative, entering and copying orders of appraisement, and including case in said list | 2 00 |
| (9) For entering and copying an order granting a license and issuing same to sell soft drinks, or any other license, other than a marriage license, or hunter's license, and administering an oath where necessary | 75 |
| (10) For issuing a marriage license | 1 00 |
| (11) For making out an injunction bond, administering all necessary oaths, writing proper affidavits, making out release of errors, copying the same, and endorsing on the summons that such bond and release are filed | 1 50 |
| (12) For making out any other bond, administering all necessary oaths, and writing proper affidavits | 75 |
| (13) For issuing a writ in the nature of an <i>ad quod damnum</i> | 50 |
| (14) On receiving a copy of a <i>caveat</i> , for entering such copy | 25 |
| (15) For issuing a summons to answer a bill, or in any common law action | 40 |
| (15½) For issuing each summons for witnesses..... | 25 |
| (16) For each copy of any process which goes out of the office (with such process) to be used in serving it, one-half of the fee for issuing such process. | |
| For noting in the process book any decree, order, or process (except a summons for a witness) and taking a receipt therefor..... | 25 |
| (17) For postage paid by the clerk on a decree, order, or process, and putting in or taking out of post-office same, double the amount of such postage; for entering in any suit, or in a motion for judg- | |

	ment for money, all the attorneys for each party, or the appearance in proper person of a party having no attorney who so appears	\$ 0 10
(18)	For endorsing and filing each petition, declaration, bill, answer or other written pleading, each bill of exceptions, demurrer to evidence, special verdict or case agreed, or of a motion for judgment, for money, each set depositions, and each report of a commissioner, and for entering each plea, replication or other pleading, which is not written	20
(19)	For endorsing and filing an affidavit, written interrogatories, an answer, or the exceptions to a commissioner's report	15
(20)	If papers be filed on the side of the plaintiff, for which no particular fee is allowed, a fee (not for each, but for the whole) of	25
(21)	So also if the papers be filed on the side of the defendants, for which no particular fee is allowed, a fee (not for each, but for the whole) of	25
(22)	For issuing an attachment, with a copy of the rule or order for the same (if sent out therewith), and recording the returns thereof where proper to do so	50
(23)	For issuing a <i>scire facias</i> and recording the return thereof, or for issuing a commission to examine witnesses administering oath when necessary as the foundation thereof, and writing affidavit....	50
(24)	For all the rules entered in any case on the same side, at any rules, where anything is done on such side, at said rules, besides entering or filing a pleading or continuing the case	50
(25)	Where no proceedings are had in a case during any rules except to continue it, the fees shall be at the rate of twenty-five cents for every quarter of a year the case is so continued, and no more.....	25
(26)	Where a jury is impanelled, if witnesses be examined by the court, for swearing such jury and witnesses	75
(27)	Where no jury is impanelled, if witnesses be examined by the court, for swearing such witnesses	

	for either part	\$ 0 25
(28)	Where a witness claims for his attendance, for administering an oath to him and entering and certifying such attendance.....	30
(29)	For administering an oath not before provided for, and writing a certificate thereof, where the case requires one	25
(30)	For all judgments, decrees, orders and proceedings (except entries of pleading and matters otherwise provided for), which are entered on the same day, for the same persons, at the election of the clerk, three cents for every twenty words (actually written on the minute or order book, or upon the rule book, when final judgments are entered therein) or a specific fee of	50
(31)	For docketing under chapter two hundred and seventy-one a judgment, decree, bond or recognition	50
(32)	For entering satisfaction of any judgment.....	25
(33)	For taxing costs in any case on one side.....	25
(34)	And if the case has been pending more than a year, then for every additional year	10
(35)	When an execution is returned by an officer, in a case wherein there is no appeal from the justices' judgment, for filing the papers	10
(36)	And if the clerk issue execution in the case, for such execution, including the record of the return of said execution (if it be returned before another issue)	50
(37)	For making out transcript of the record and proceedings in any case, in due form, so that the same may be used in an appellate court, for every twenty words	03
(38)	And for making out, in any other manner than copying, any paper to go out of the office, which is not otherwise provided for, the same, or in lieu thereof, if the clerk elect, a specific fee of.....	25
(39)	For any copy to go out of the office if it be not otherwise provided for, for every twenty words, three cents, or in lieu thereof, if the clerk elect, a specific fee	25

(40)	For annexing the seal of the court to any paper, writing the certificate of the clerk accompanying it, and writing certificate of the judge, if the clerk be requested so to do	\$ 0 50
(41)	For making statement, calculating interest, receiving payment of taxes on any tract of land returned delinquent for first three years	50
	And for each additional year	10
(42)	For each tract of land entered in the delinquent land book, to be paid out of the State treasury..	10
(43)	For any other writ not hereinbefore provided for	50
(44)	For making out the bond upon issuing any such writ, administering necessary oaths, and writing proper affidavits	75
(45)	Upon any such writ, for endorsing same and filing the petition therefor or when the writ is returned, for filing it, with the return thereon	20
(46)	For filing the record upon an appeal or on such writ	20
(47)	When the clerk of the court of appeals issues process on an appeal, writ of error, or supersedeas, for making out the bond, administering necessary oaths, writing proper affidavits, and endorsing on the process a certificate of the execution of the bond, and of the names of the sureties therein	1 00
(48)	For docketing any case, a fee of.....	25
(49)	Or, if the clerk elect, in lieu thereof three cents for every twenty words entered on the rule book when it is first docketed, this fee for docketing to be charged but once, except that when any case, either at law or in equity is on the court docket, if at any term it be left undecided, without an order of continuance, there shall be a fee for putting it on the docket at the next term of	25
(50)	After a decision by the Circuit, Corporation, or Hustings Court or Court of Appeals, as an appellate court, for issuing an execution, making entry thereof in the execution book, and recording the return	75
(51)	Unless the decision be by the court of appeals in	

a case wherein the first judgment or decree was in a circuit or city court, in which case the fee shall be	\$ 1 00
(52) For taxing the damages to which a party may be entitled by reason of an injunction, appeal, writ of error, or supersedeas	50
(53) For reporting marriage licenses under section fifty hundred and ninety-six, to be paid out of the State treasury, for each marriage reported	10
(54) For reporting divorce under act approved March fifteenth, nineteen hundred and eighteen, to be paid out of the State treasury, for each divorce reported	25
(55) For services required of the clerk under sections 2471 and 2489 (as to copies of reports to Auditor, Supervisors, and Council, under delinquent land law) of the Code, the clerk shall be entitled for each name on each copy of the reports required to be made by said sections, to be paid out of the State treasury upon certification of the court....	05

§ 7. Clerks of circuit, appellate and other courts in chancery cases:—

(1) For issuing an attachment or a summons, with an endorsement of an order of attachment or injunction	\$0 50
(2) For process for which no higher fee is allowed..	25
(3) When more than three exhibits are returned with a commissioner's report (but not annexed thereto), for endorsing and filing such exhibits a fee, not for each, but for all filed with the same report of	25
(4) If papers be filed on the side of the plaintiff or defendant, for which no fee is before provided, a fee, not for each, but for the whole of such papers, on either side, of	25
(5) And if papers be filed on the side of defendants, for which no fee is before provided, a fee, not for each but for the whole of such papers, of	25
(6) For entering in the rule book the return of all process returnable to the same rule day, a fee not for each defendant named therein nor for every such	

- process, but for the whole of the defendants named in all such process, of\$ 0 35
- (7) For all the rules entered in any case on the same side at the rules for one month, when anything is done on such side at said rules besides entering or filing a pleading or continuing the case 50
- (8) For any execution, the entry of the case in the execution book and the record of the return, unless a higher fee be allowed therefor 50
(Code, § 3485.)

§ 8. Clerks of Supreme Court of Appeals; to whom cost of printing record is charged; when case dismissed if cost of printing not paid; amount taxed for printing to be paid into treasury.—See Code, § 3486.

§ 9. For what service clerks not to charge.—“No clerk shall charge for taking bond from, administering oath to, or making or copying orders as to the appointment or qualification of any justice, sheriff, sergeant, treasurer, coroner, commissioner of the revenue, superintendent of the poor, surveyor, or of a deputy or assistant of any of them, or of any escheator, supervisor, constable, militia officer, or overseer of the poor, or of a guardian, where his bond is in a penalty not exceeding one thousand dollars, or for making or copying orders as to binding out poor children, or as to county allowances, or grand juries, and administering the necessary oaths.” (Code, § 3491.)

§ 10. Who pays clerk's fees; fee bills, etc.—See *Sheriffs, Sergeants, Constables, etc.*, section 22. For each felony case tried, to be charged only once, \$2.50, out of the treasury (Code, § 3506).

§ 11. Sheriffs, sergeants, constables, criers, and coroners.—See *Sheriffs, Sergeants, Constables, etc.*, section 22, and div. X. of *Justice of the Peace*.

§ 12. Commonwealth's attorney.—See Code, § 3504-5, as amended by Acts 1922; and Acts 1922, p—. No fees are allowed unless he or his assistant appears and prosecutes the case—Acts 1922, p—.

§ 13. Jailor.—See *Jailor*.

§ 14. Witnesses.—See div. X., under *Justice of the Peace*.

§ 15. Commission to consider compensation of officers.—

See Code, § 3516, and Acts 1918, pp. 220, 630, and Acts 1920, pp. 393, 827.

FENCES

- § 1. Landowners required to fence against animals
- § 2. What is a lawful fence
- § 3. How division fences built or repaired
- § 4. When railroads to inclose their roadbed
- § 5. Trespasses by animals
- § 6. Offenses as to fences

§ 1. Landowners required to fence against animals.—At common law, a landowner had to fence in his cattle and domestic animals, and not to fence out other's. But by statute (§ 3541), the common law is modified so as to make a landowner fence in his lands against the "horses, mules, cattle, hogs, sheep, or goats" of another, and makes the owner of such animals liable only where the other has enclosed his lands with a "lawful fence." See *Animals, Fowls, etc.*, § 9, (2). Neither was a railroad required to fence at common law, but is by statute—see *Railroads and Railroad Companies*, sections 2 and 3.

§ 2. What is a lawful fence.—A "lawful fence" must be 5 feet high, including mound or ditch, and built of boards or barbed wire as directed in the statute (§ 3538); or it may in some cases be declared by the court to be a stream of water or a canal (§§ 3553-4); or be declared by the board of supervisors to be the imaginary "boundary line of each lot or tract of land or any stream" (§ 3547, as amended by Acts 1922); or be declared by a special statute to be certain water courses or county boundary or boundary lines of certain low grounds on James River (§§ 3539, 3562); and the new Code continues in force all local acts as to making or repairing division fences in any county or part thereof (§ 3562). Special laws as to fences, etc., are now prohibited. (Va. Const., § 63.)

§ 3. Division fences; by whom to be built and maintained; proceedings for the erection and repair thereof.—

By Act 1922, p. —: "Adjoining landowners shall build

and maintain, at their joint and equal expense, division fences between their lands, unless one of them shall choose to let his land lie open as hereinafter provided for, or unless they shall otherwise agree between themselves.

"Proceedings for the erection and repair of such fences shall be as follows:

"(a) Wherein no division fence has been built, either one of the adjoining owners may give notice in writing of his desire and intention to build such fence, to the owner of the adjoining land, or to his agent, and require him to come forward and build his half thereof. The owner so notified may, within 10 days after receiving such notice, give notice in writing to the person so desiring to build such fence, or to his agent, of his intention to let his land lie open, in which event, and if the one giving the original notice shall build such division fence and the one who has so chosen to let his land lie open, or his successors in title, shall afterwards enclose it, he, or they, as the case may be, shall be liable to one-half of the value of such fence at the time such land shall be so enclosed, and such fence shall thereafter be deemed the one who built such fence, or to his successors in title, for a division fence between such lands.

"If, however, the person so notified shall fail to give notice of his intention to let his land lie open, as hereinabove provided, and shall fail to come forward within 30 days after being so notified, and build his half of such fence, he shall be liable to the person who builds the same for one-half of the expense thereof, and such fence shall thereafter be deemed a division fence between such lands.

"(b) When any fence which has been built and used by adjoining land owners as a division fence, or any fence which has been built by one, and the other afterwards required to pay half of the value, or expense thereof, under the provisions hereinbefore contained, and which has thereby become a division fence between such lands, shall become out of repair to the extent that it is no longer a lawful fence, either one of such adjoining landowners may give written notice to the other, or to his agent, of his desire and intention to repair such fence, and require him to come forward and repair his half thereof, and if he shall fail to do so within

thirty days after being so notified, the one giving such notice may then repair the entire fence so as to make it a lawful fence, and the other shall be liable to him for one-half of the expense thereof.

"(c) Any sum which may be due and payable by one adjoining land owner to another in pursuance of any of the provisions hereof, may be recovered by motion, action or warrant, according to the amount.

(d) No agreement made between adjoining landowners with respect to the construction or maintenance of the division fence between their lands, shall be binding on their successors in title, unless it be in writing and specifically so state, and be recorded in the current deed book in the clerk's office of the county in which the land is situate, and properly indexed as deeds are required by law to be indexed.

(e) Any notice herein provided to be given, shall be given to the owner of the land, if he reside in the county in which the land lies; otherwise, it may be given to such person as, under the laws of Virginia, would be his agent; or to any person occupying such land as tenant of the owner, who shall, for the purposes of this act, be deemed the agent of such owner"; and repealing the former law as found in sections 3556-61 of the Code.

§ 4. When railroads to inclose their roadbed.—See *Railroads and Railroad Companies*, sections 2, etc.

§ 5. Trespasses by animals.—See *Animals, Fowls, etc.*, section 9, (2).

§ 6. Offenses as to fences.—Maliciously setting "fire to any woods, fence, grass, straw, or other thing capable of spreading fire on lands," is punishable by penitentiary one to three years, or fine of \$5 to \$500 and jail one to 12 months. (Code, § 4434.)

Malicious injury to fences or cattle-stops along the line of railroads, is punishable by jail not under 15 days, or fine not under \$10, or both. (Code, § 4476.)

Unlawful injuring or taking any fence or other property, is punishable by a fine of \$5 to \$500. (Code, § 4479.)

Malicious injury to fences in capitol or any public square or grounds, is fineable not over \$300. (Code, § 4483.)

If one pulls down and leaves down a fence, or opens and

leaves open a gate, without the owner's permission, or if a stranger opens and leaves open a gate at a public or private railroad crossing, he is fineable \$5 to \$20. (Code, § 4481, as amended by Acts 1918, p. 140.)

Maliciously injuring or taking any fence, etc., in a cemetery or burial grounds, is fineable not over \$100, or jailable not over 6 months. (Code, § 4553.)

FERRIES

§ 1. Penalty for inattention or for not giving passage in reasonable time.—"If at any ferry or bridge there be a failure to give any person passage over the same in a reasonable time, or a failure to give adequate attention to the operation of any ferry, the proprietor of such ferry or bridge shall be guilty of a misdemeanor, and upon conviction thereof fined not less than \$2.50 nor more than \$5.00." (Code, § 2072, as amended by Acts 1922.)

§ 2. Code chapter as to ferries.—See Code, §§ 2040-66, and Acts 1920, p. 359, amending § 2052.

FIDUCIARIES (GENERALLY)

See *Administrator and Executors; Agents and Agency; Committee; Guardian and Ward; Trusts and Trustees*

§ 7. Definition.—The term "fiduciary" applies to all persons who occupy a position of peculiar confidence towards others, such as an administrator or executor, committee of a lunatic, guardian, trustee, agent, etc.

§ 2. Statutory provisions.—For a chapter as to "Fiduciaries Generally", see Code, §§ 5401-40, and Acts 1920, pp. 341, 595, amending § 5412, p. 556, amending § 5431 (see also § 2595); and Acts 1922, amending § 5428.

FINDING PROPERTY

- § 1. Liability and rights of finder as against the owner
- § 2. Estray cattle, drift property, and wrecks
- § 3. Right of finder of lost, mislaid, or hidden property

§ 1. Liability and rights of finder as against the owner.

—A finder taking possession, as, of a horse, is bound to take proper care of him, as, to feed and water him. He must also make reasonable effort to find the owner, and is liable if he deliver it to the wrong person as owner. The finder, on the other hand, is entitled to his necessary expenses, and any reward offered; but he has no lien for the expenses, and so cannot hold the property therefor, but otherwise as to a fixed reward. As to estray cattle and drift property, see next section. (4 Am. Law & Proc., p. 87.)

§ 2. Astray cattle, and drift property and wrecks.—By statute (§§ 3564-72), in case of an estray, found on one's land, or a boat or vessel adrift, the finder may take possession, and inform a justice who issues his warrant to three freeholders to make appraisement, which is recorded and posted at the court-house by the clerk for two terms; and where the value is under \$5, or if over and the notice is also published 3 times in a newspaper, if the owner does not appear, the property belongs to the finder; but the owner may afterwards recover the appraisement value, less all costs and fees. The finder is not liable for death or injury, without his fault. As to drift property on another's land (other than a boat or vessel) the finder, as against third person, is treated as the owner; the owner himself, on paying for proper care, labor, or expense, and injury by removal, may remove the property; but if he does not remove it within 3 months, the finder may sell or keep the property and must pay to the owner any balance, after all expenses are paid, which balance, the owner may recover. As to wrecks, see Code, §§ 3596-3612.

§ 3. Right of finder of lost, mislaid, or hidden property.

—The fortunate finder of lost property, i. e., property found where it was not meant to be put by the owner, as, where accidentally dropped,—has title to it as against all the world, save the rightful owner, and this is true even though he be an employee, but not true where the finder is a trespasser. But if only mislaid, i. e., placed by the owner where they are

discovered and never claimed by him, as, a pocketbook left on the table in a barber shop,—the possessor of the premises where mislaid has a better right than some other person who happens to see it first; but otherwise, if the property was accidentally dropped, as, the pocketbook on the floor of the barber shop. (Graves' Notes.) As to hidden treasure, i. e., money or other valuables, not casually lost, but hidden in the earth or elsewhere, the owner being unknown, "is supposed", says Prof. Minor, "to belong to the Commonwealth." (3 Min. Inst. 39.) Such property would perhaps be held as belonging to the owner of the premises, as "mislaid" property, unless, indeed, it be considered as embraced by the words "any property derelict, or having no rightful owner", which section 518 of the Code says may be recovered for the Commonwealth. But does not a found treasure, as in the case of a pot of gold and silver recently found near Salem, Va., have a rightful owner the moment it is found? Before that time there is no property to sue for.

FINES

- § 1. Recovery of fines before a justice
- § 2. Recovery of fines in court
- § 3. Relief from fines
- § 4. How and when person in jail until fine is paid released

§ 1. Recovery of fines before a justice.—See *Justice of the Peace*, divisions I., V., VI., and VII.

§ 2. Recovery of fines in court.—See Code, §§ 2543, etc., and Acts 1920, pp. 319, 67, amending §§ 2543, 2551, respectively.

§ 3. Relief from fines.—The Governor may, upon proper procedure, remit fines and penalties, except in cases of contempt of court, fines for non-performance of or disobedience to some court order, judgment, or decree, fines imposed by the State Corporation Commission or by the House of Delegates; and upon the death of an offender, the Governor may remit the fine upon the certificate of the judge that to enforce it against the estate would impose hardship upon the widow

and children. And the procedure is prescribed by statute. (Code, §§ 2569-74.)

A court may during the same term remit, either wholly or partly, a fine for contempt, but not at any other fine. (Code, § 2557.)

§ 4. How and when person in jail until fine is paid released.—By section 4953 of the Code: "If a person is confined in jail by order of any court or justice until his fine and costs, or costs where there is no fine are paid, or under *capias pro fine*, such confinement shall not exceed ten days when the fine and costs, or costs where there is no fine, are less than \$5, when less than \$10 it shall not exceed twenty days, when less than \$25 it shall not exceed one month, when less than \$50 it shall not exceed two months, and in no case shall the confinement exceed three months. The jailer upon commitment shall note the amount of fine and costs, or costs where there is no fine, and the date of commitment, and shall, without further order or direction, release the defendant from jail promptly upon the expiration of the limitation above prescribed, and said defendant shall not thereafter be imprisoned for failure to pay the fine and costs, or costs, in that case; but nothing herein or in the preceding section shall prevent the issue of a writ of *feri facias* after such release from jail."

By section 4952: "When a person is confined in jail by order of any court or justice until he pay a fine and the costs of prosecution, or the costs where there is no fine, or under *capias pro fine*, on application to the circuit court of the county or corporation court of the city where confined, or to the judge thereof in vacation, such court, or judge in vacation, as the case may be, if to such court or judge it shall appear proper, may order the person to be released from imprisonment without the payment of the fine and costs, or costs where there is no fine, and he shall not thereafter be imprisoned for failure to pay the fine and costs or costs in that case; but the attorney for the Commonwealth of said county or city shall have five days' notice of such application."

If a person is in jail as above, the sheriff, or sergeant, with the assent in writing of the prisoner, may hire him out (not over 6 months) to one who will agree to pay the whole fine and costs (Code, § 4950).

A person sentenced for a term and afterwards until he pays a fine and costs, continues in jail until the same are paid, or he is released under one or the other of the above sections. (Code, § 4949.)

FISHING AND FISHERIES

See Oysters and Other Shell- Fish

- § 1. Commission of Fisheries
- § 2. Department of Game and Inland Fisheries
- § 3. Fishing generally
- § 4. In Potomac river
- § 5. Local statutes
- § 6. Procedure for enforcing forfeitures, under fish, oyster, and game laws

§ 1. **Commission of Fisheries.**—See Code, §§ 3146-65, and Acts 1922, amending § 3160, and Acts 1918, p. 437 (as to the Commission's granting relief to renters of oyster planting grounds, on account of "green gill" in the oysters).

§ 2. **Department of Game and Inland Fisheries.**—See Code, §§ 3306-18.

§ 3. **Fishing generally.**—See Code, §§ 3166-3218; and Acts 1918, pp. 451, 357, 464, 408, amending §§ 3168, 3172, 3192, 3211, respectively; and Acts 1920, pp. 573, 408, 406, 420, amending §§ 3172, 3187-8, 3194, 3210, respectively; and Acts 1922 amending §§ 3173, 3181, 3184, 3187, 3202, 3205-6, 3209. See, also, Acts 1918, p. 564 (for the encouragement of the production of food fish); Acts 1918, p. 446 (as to licensing persons to breed game fish; Acts 1922, p.— (as to licensing the taking or catching scallops with scraps); and Acts 1922, p.— (limiting the number of game fish that may be taken in one day).

§ 4. **In Potomac river.**—See Code, §§ 3299-3305.

§ 5. **Local statutes.**—Section 3218 of the Code continues in force the following local acts (date indicated) for the protection of fish, and Acts 1918 and 1920 have added others: In Nottoway river in Southampton, Sussex, Dinwiddie, Brunswick and Greensville counties (1906); in the Shenandoah river

and its tributaries (1906); in the Meherrin river (1916); in Clinch river in Scott county (Acts 1918, p. 278); in any stream in Scott county (Acts 1918, p. 537); in James river opposite Lynchburg (Acts 1918, p. 266; in ponds (bass), allowed (Acts 1920, p. 633). The Code (see § 6567) repeals only Acts of a general nature. See 88 Va. 205. Also title *Statute*.

§ 6. Procedure for enforcing forfeitures, under fish, oyster, and game laws.—See Code, §§ 3366-77.

FIXTURES

- § 1. Definition of a fixture
- § 2. Criteria for determining permanency of annexation
- § 3. Trade fixtures
- § 4. Agriculture fixtures
- § 5. Manure as a fixture
- § 6. Domestic and ornamental fixtures
- § 7. Interest of annexor in the land as affecting the permanency of the annexation
 - (1) Where annexor is fee simple owner of the land
 - (2) Where annexor is tenant for years or at will
 - (3) Where annexor is tenant for life

§ 1. Definition of a fixture.—A fixture is personal property so annexed to land or a building or other structure as to be easily detached without injuring the same, and which is not necessary to the enjoyment or completeness thereof. Sometimes it is used in the opposite sense, of personal property annexed permanently by its owner or with his consent, when it becomes a part of the land. The former might be called personal fixtures, which may be removed, and the latter real fixtures, which cannot be. (1 M's Real Prop., § 25.)

§ 2. Criteria for determining permanency of annexation.—Intention is the main thing, which may be shown: (1) By the express agreement of the parties; (2) by the character of the annexation, as where the chattel is so attached that it cannot be detached without seriously tearing or injuring the other property, as, a house with foundations in the land (not merely resting thereon by its own weight or blocks), or a staircase, marble mantels mortised into the walls, wainscoting fastened

by nails (but not by screws, etc); (3) by the peculiar adaptation of the fixture for use with the realty and usually accompanies the realty or is indispensable to its proper and complete enjoyment, as, machinery, engines, boilers, etc., in mills and factories, window shutters, doors, keys, mill-stones, and the like, though capable of being detached without breaking or tearing the building, or actually detached for a temporary purpose, as to be painted, etc.; (4) by the nature and purpose of the fixture, as for trade, agriculture, domestic, or ornamental purpose, permanent annexation being most strongly presumed in the case of domestic or ornamental fixtures, and least strongly, in case of trade or agriculture fixtures; and (5) by the interest in the land of the party making the annexation, according as it is more or less permanent, the probability of an intention to annex permanently being in proportion to the permanency of that interest. (1 M's Real Prop., §§ 26-30.)

§ 3. Trade fixtures.—These are more freely removable than any others, such as showcases, counters and shelves, boilers and engines, etc. (1 M's Real Prop., § 31.)

§ 4. Agriculture fixtures; manure.—The tendency is to regard such fixtures (as, barns, sheds, etc.) as removables like trade fixtures. (1 M's Real Prop. 32.)

§ 5. Manure as a fixture.—By statute (somewhat enlarging the common law), manure "made on the farm in the ordinary course of husbandry, consisting of ashes, leached or unleached, collections from the stables, barnyard, cattle pens, or other places on the leased premises, or composts formed by an admixture of these or any of them with the soil or other substantances," cannot be removed by a tenant at will or for years. (Code, § 5510.)

Likewise by the common law, manure passes by a conveyance of the land, or descends with it to the heir; a mortgagor after the maturity of the mortgage, may stop its removal. But if it be brought upon the land from elsewhere, as from a livery stable, or the stock is fed with feed raised elsewhere, it is removable and does not pass with a conveyance of the land. (1 M's Real Prop., § 33.)

§ 6. Domestic and ornamental fixtures.—These are removable (at least by another than the fee simple owner of

the land) only where it strongly appears that the annexation was merely intended to be temporary, as that the chattel can not easily be detached without tearing or injuring the other property and that it is not essential to the complete enjoyment thereof. Hence, mirrors, wardrobes, stoves, radiators, lavatories, chandeliers, chimney pieces, marble mantels, and even wainscoating fixed by screws, etc., may be removed by the tenant for years, when annexed by himself. (1 M's Real Prop., § 34.)

§ 7. *Interest of annexor in the land as affecting the permanency of the annexation.*—The interest or estate possessed by the annexor is very important in ascertaining the intention of the annexation.

(1) *Where annexor is fee simple owner of the land.*—Here it is generally supposed to have intended permanent improvements, and the fixtures are not removable, but pass by descent, sale, conveyance, mortgage, or will, along with the land as a part of it. Of course a severance by the owner, actual or constructive (as where he sells or mortgages them), makes the fixtures again personal property. (1 M's Real Prop., § 36.)

(2) *Where annexor is tenant for years or at will.*—Here it would scarcely be intended to make a permanent gift; but the removal must take place during the term of the lease, or a reasonable time thereafter, in case of a tenant for life or at will. (1 M's Real Prop., § 37.)

(3) *Where annexor is tenant for life.*—Here stronger circumstances are required to show permanency than in the case of a fee simple owner, but not so strong proof as in case of a tenant for life or at will. (1 M's Real Prop., § 38.)

See

FORCIBLE ENTRY AND DETAINER

See Unlawful Entry or Detainer

§ 1. Definition of these offenses

§ 2. Punishment of these offenses

§ 1. **Definition of these offenses.**—Forcible entry or de-

tainer is a common law misdemeanor, and is committed by violently taking or keeping possession of lands or tenements with menaces, force, or arms, and without the authority of law. The gist of the offense is violence, which must exceed a bare trespass, and give reasonable grounds for terror; and this may be excited by threatening speeches, the show of arms, the number of attendants, or the like, as well as by actual violence. The offense is against the possession, so that, however rightful one's claim may be to the premises, the law will not permit him to endanger the public by forcibly ousting the one in possession. But where one has a bare charge as a servant, or is a mere intruder, without color of title, past or present, and has entered by fraud or violence, or on a mere scrambling title, the owner may forcibly enter. If one has a bare charge, or who is a mere intruder, forcibly detain the possession against the rightful owner, he is guilty of forcible detainer. But not so as to a tenant at will or by sufferance, who may defend his possession by force adequate to the purpose. (H's G. & M., pp. 350-1).

§ 2. Punishment of these offenses.—Forcible (and perhaps unlawful) entry or detainer is a misdemeanor punishable by a fine not over \$500, or jail not over 12 months, or both. (Code, § 4782.)

FORESTALLING, REGRATING, AND ENGROSSING

See Anti-Trust Law

§ 1. Definition of these offenses

- (1) Forestalling
- (2) Regrating
- (3) Engrossing

§ 2. Punishment

§ 3. Form of "description" in warrant or indictment

§ 1. Definition of these offenses.—Forestalling, regrating, and engrossing are offenses at common law, and are defined as follows:

(1) *Forestalling* is to buy or contract for any merchandise or victuals on the way to market; or to dissuade persons from

bringing their goods or provisions thither; or to persuade them to enhance the price; or by any device or practice whatever, whether by act, conspiracy, words, or news, to make the market dearer to the fair dealer, with intent to enhance the price.

(2) *Regrating* is to buy corn or other dead victuals, in any market and to sell it again in the same market, or its neighborhood.

(3) *Engrossing* is to get into one's possession large quantities of corn or other dead victuals with intent to sell them again.

It should be observed, however, that the gist of these offenses is the intent to raise the price of the necessities of life; but the acts which are made criminal carry with them the presumption of such intent. (H's G. & M., p. 366.)

§ 2. **Punishment.**—Fine not over \$500, or jail not over 12 months, or both. (Code, § 4782.)

§ 3. **Form of "description" in warrant or indictment.**—

No. 1. FORESTALLING

(Code, § 4782.)

DESCRIPTION:

"did unlawfully buy one hundred hogs of one E. F. for the sum of three hundred dollars, as he the said E. F. then and there was going on the way to a certain market in the city of R., called the ——— market, to sell the said hogs, and before the same had reached the said market where they were to be sold";

OR SECOND DESCRIPTION:

"did unlawfully dissuade one E. F. from taking butter and other provisions, as he had intended, to a certain market called ———, by telling him the said E. F. that [here state what was said]."

See, also, *Anti-Trust Law*.

No. 2. REGRATING

(*Idem.*)

DESCRIPTION:

"in a certain market called ———, did buy and get into his possession ten turkeys, fifty chickens, twenty ducks, and fifteen pounds of butter, of and from one E. F., for the sum of five dollars, and that the said C. D. did afterwards on that day, in the said market, unlawfully regrade the said turkeys, chickens, ducks, and butter, and sell the same again to one E. F. for ten dollars."

See, also, *Anti-Trust Law*.

No. 3. ENGBOSSING
(*Idem.*)

DESCRIPTION:

"did unlawfully engross, buy up, and get into his possession a large quantity of dead victuals, to-wit: two hundred bushels of Irish potatoes, with intent to sell them again." See No. 3, under *Conspiracy*. See, also, *Anti-Trust Law*.

FORGERY

See *Banks and Banking; Cheats, False Pretense, and Other Frauds*

I. THE STATUTES

- § 1. Forging public records, etc.; how punished
- § 2. Forging, or keeping an instrument for forging, a seal; how punished
- § 3. Giving courts of record power to suspend sentence in certain cases
- § 4. Forging coin and bank notes; how punished
- § 5. Making or having in possession anything designed for forging any writing; how punished
- § 6. Forging, uttering, etc., other writings; how punished
- § 7. Having in possession, knowingly, forged coin or bank notes, with intent to utter same, etc., or selling same, etc., so as to enable another to do so; how punished
- § 8. Making false entry record, etc., in book, etc., required to be kept by chapter

II. OBSERVATIONS UPON THE FOREGOING STATUTES

- § 9. Definition of forgery under the statutes
- § 10. What is a false making, and illustrations
- § 11. The counterfeit must resemble the genuine
- § 12. What is uttering a forged writing or other thing
- § 13. Fraudulent intent is necessary to forgery
- § 14. Evidence and indictment under this chapter
- § 15. Form of "description" in warrant or indictment

I. THE STATUTE

§ 1. **Forging public records, etc.; how punished.**—"If any person forge a public record, or certificate, return, or attestation, of a clerk of a court, public register, notary, judge, justice, or any public officer, in relation to any matter wherein such certificate, return, or attestation may be received as legal proof, or utter, or attempt to employ as true, such forged record, certificate, return, or attestation, knowing the same to

be forged, he shall be confined in the penitentiary not less than 2 nor more than 10 years." (Code, § 4484.)

§ 2. Forging, or keeping an instrument for forging, a seal; how punished.—"If any person forge, or keep or conceal any instrument for the purpose of forging the seal of the Commonwealth, the seal of a court, or of any public office, or body politic or corporate in this State, he shall be confined in the penitentiary not less than 2 nor more than 10 years." (Code, § 4485.)

§ 3. Giving courts of record power to suspend sentence in certain cases.—"Upon a conviction in a court of record of the charge of larceny, forgery or uttering or attempting to employ as true such forged writing, knowing it to be forged, such court may, in its discretion, suspend sentence, during the good behavior of the person convicted, provided that he has not been previously convicted of a like offense or any felony." (Code, § 4486.)

§ 4. Forging coin and bank notes; how punished.—"If any person forge any coin current by law or usage in this State, or any note or bill of a banking company, or fraudulently make any base coin, or a note or bill purporting to be the note or bill of a banking company, when such company does not exist; or utter, or attempt to employ as true, or sell, exchange, or deliver, or offer to sell, exchange, or deliver, or receive on sale, exchange, or delivery, with intent to utter or employ, or to have the same uttered or employed as true, any such false forged, or base coin, note or bill, knowing it to be so, he shall be confined in the penitentiary not less than 2 nor more than 10 years." (Code, § 4487.)

§ 5. Making or having in possession anything designed for forging any writing; how punished.—"If any person engrave, stamp, or cast, or otherwise make or mend, any plate, block, press, or other thing adapted and designed for the forging and false making of any writing or other thing, the forging or false making whereof is punishable by this chapter; or if such person have in possession any such plate, block, press, or other thing, with intent to use, or cause or permit it to be used, in forging or false making any such writing or other thing, he shall be confined in the penitentiary not less than 2 nor more than 10 years." (Code, § 4488.)

§ 6. Forging, uttering, etc., other writings; how punished.—"If any person forge any writing, other than such as is mentioned in sections 4484 and 4487 (see sections 1 and 4, above), to the prejudice of another's right, or utter, or attempt to employ as true, such forged writing, knowing it to be forged, he shall be confined in the penitentiary not less than 2 nor more than 10 years." (Code, § 4489.)

§ 7. Having in possession, knowingly, forged coin or bank notes, with intent to utter same, etc., or selling same, etc., so as to enable another to do so; how punished.—"If any person have in his possession forged bank notes, forged or base coin, such as are mentioned in section 4487 (see section 4, above), knowing the same to be forged or base, with the intent to utter or employ the same as true, or to sell, exchange, or deliver them, so as to enable any other person to utter or employ them as true, he shall, if the number of such notes or coins in his possession at the same, be ten or more, be confined in the penitentiary not less than one nor more than five years: and if the number be less than ten, be punished as for a misdemeanor"—i. e., by fine not over \$500 or jail not over 12 months, or both (Code, § 4782). (Code, § 4490.)

§ 8. Making false entry, record, etc., in book, etc., required to be kept by chapter; how punished.—"If any clerk of a court, commissioner of the revenue, physician, surgeon, coroner, or minister celebrating a marriage, or clerk or keeper of the records of any religious society, shall, in any book, register, record, certificate or copy which such person is by chapter 204 (as to "marriage, births and deaths") required to keep, make or give, knowingly make any false, erroneous, or fraudulent entry, record, registration, or written statement, he shall, for every such offense, be fined not less than \$100 nor more than \$500. (Code, § 4491.)

Making false statement, etc., for such record, etc., is fineable \$50 to \$100. (Code, § 4492.)

II. OBSERVATIONS UPON THE FOREGOING STATUTES

§ 9. Definition of forgery under the statutes.—The statutes do not define forgery, but merely assigns the punishment for forgery of the different writings and other things enumerated in the several sections thereof, making a felony of an offense which was only a misdemeanor by the common

law. Thus, section 1, above, assigns punishment as to public records and other writings of a public nature; section 2, as to certain seals; section 4, as to coins and bank notes; and section 6, as to any other writing the forgery whereof would prejudice another's right. Each of these sections, it will be observed, commences with the phrase, "If any person forge," thus leaving it to the common law to define forgery. So that, applying the common law to the statutes, forgery in Virginia may be defined as follows:

The false making (including alterations and additions), for the purpose of fraud or deceit, of any writing or other thing specially designated in the several sections of the statutes; or of any other writing, the forgery whereof may prejudice another's right. "To the prejudice of another's right" is descriptive of the writings of which forgery may be committed, and not of the offense, and so may not be alleged. A letter recommending a person to credit has been held—though incorrectly, Mr. Minor believes—not within the phrase, and so is not the subject of forgery. By a recent case it is held that if the writing, by any possibility, may operate to the injury of another, it is sufficient (100 Va. 825). (H's G. & M. pp. 218-19.)

§ 10. What is a false making, and illustrations.—The false making which amounts to forgery, includes the making of any writing which is the subject of forgery, as well as the altering, adding to, taking from, or erasing the same, without lawful authority, whereby an appearance of truth is given to mere deceit and falsity. Illustrations:

- (1) False making of the entire instrument.
- (2) Signing one's own name, with a false addition really belonging to another person of the same name.
- (3) False signature to a true instrument, or a true signature to a false instrument—e. g., the endorsing of a genuine bill with a false name; procuring a genuine name and writing a false instrument over it; endorsing a genuine bill with one's true name, which happens to be the same as that of the payee; issuing a note with a true name as the note of another of that name, and such like.
- (4) Signing the name of a fictitious or non-existing person with intent to defraud—e. g., making a power of attorney

in the name of a fictitious distributee, or a promissory note, bill of exchange, check, or the like, with intent to defraud.

(5) Fraudulent and material alteration by addition, diminution, transmutation even of a single letter, or otherwise—e. g., altering the date of a bill after acceptance so as to hasten the time of payment; adding or removing a seal; enlarging grantee's estate in a conveyance; inserting or erasing a legatee's name in a will; and the like.

(6) False making of any writing in one's true name to the prejudice of another—e. g., signing a note with the party's true name representing himself as another person, who has the same name.

(7) Brightening pieces of base coin, thereby making them passable. (H's G. & M. pp. 219-20.)

§ 11. The counterfeit must resemble the genuine.—There must be such a resemblance between the counterfeit writing or coin and the genuine as is calculated to impose upon persons of ordinary observation. If the writing carries on its face the essentials of a true instrument, or is apparently valid, it may be a forgery notwithstanding that if it were genuine it would have no validity. Thus, forgery may be of a will of one yet living; of a bond of an imaginary or non-existing person; or a note of an unchartered bank, or one illegally chartered or not existing, and the like. But it cannot be forgery if there be no semblance of genuineness, or if on its face it be illegal and void, or if it wants a signature. (H's G. & M. p. 220.)

§ 12. What is uttering a forged writing or other thing.—Forging and uttering are essentially distinct offenses, neither being necessary to the completion of the other; yet forging and uttering the same instrument may be charged in different counts of the same indictment, as the prisoner would not thereby be confounded or the attention of the jury distracted. Uttering a forged writing or other thing is parting with or passing it, or offering it with that view, or attempting to employ it as true, whether it be accepted or not, or even to declare or assert, directly or indirectly, by words or actions that it is genuine, with intent to defraud and knowing the same to be forged; and this is true, though the person receiving it knew it to be forged, or though the uttering be not for the benefit

of the utterer. The statute makes it an offense, also, to receive forged, false, or base bank notes or coins "on sale, exchange, or delivery, with intent to utter," &c. The *scienter*, or guilty knowledge that the writing or other thing is a forgery, is of the essence of the offense and must be proved; but the jury may infer it from the unexplained possession of similar forged writings; from having uttered or passed about the same time others of the same kind, &c. (H's G. & M. pp. 220-1.)

§ 13. Fraudulent intent is necessary to forgery.—A fraudulent intent is essential to forgery, but the jury ought to infer it from the false making (unexplained) of any writing or other thing which is the subject of forgery. And it is immaterial whether any one be actually injured or not, if some one might have been. A general intent to defraud is sufficient; indeed, by statute, intent to defraud any particular person need not be alleged, and if alleged it is no variance to prove an intent to defraud "the United States, or any state, county, corporation, officer, or person" (Code, § 4873). (H's G. & M., p. 221.)

§ 14. Evidence and indictment under this chapter.—The prosecution may disprove the genuineness of the signature by any one acquainted with the party's handwriting, and he need not be the person whose name is forged; also the counterfeit character of a coin may be proved at the trial without producing it or accounting for its non-production; and the genuineness of a signature may be proved by comparison, by an expert, with writings known to be genuine. (H's G. & M. pp. 221, 590; 82 Va. 1.)

The existence of the bank, under section 4, above, may be proved by parol, and it is immaterial though it be unchartered, unconstitutional, or in another state, wheresoever and by whomsoever created, and an allegation that it is authorized by the laws of another state is mere surplusage and need not be proved.

It is not needful to prove, under section 5, above, that any coin was made with the instrument; but it is not sufficient to describe the instrument merely as one "die and instrument" for the purpose of making and impressing the stamp and similitude of the current coin called half a dollar.

To sustain a verdict for felony, under section 7, above,

it must be alleged and proved that the accused had ten or more such notes at the same time, and not merely on the same day.

The United States and the State courts have concurrent jurisdiction of the offense of forgery of national currency or coin; so, a person may be convicted twice for the same offense.

In a prosecution for any offense under this chapter, by statute it is provided that it shall not be necessary to set forth any copy or *fac simile* of any instrument or other thing but that it shall be sufficient to describe the same as in an indictment for larceny. (Code, § 4871). (H's G. & M., p. 222.)

§ 15. Form of "description" in warrant or indictment.

No. 1. FORGING A CERTIFICATE OF ACKNOWLEDGMENT OF A DEED
(Code, § 4484.)

DESCRIPTION:

"feloniously and with intent to defraud, did forge a certain paper writing, purporting to be a certificate of J. M., a justice for the county of ———, of the acknowledgment of a deed of conveyance of certain lands from the said A. B. to the said C. D., which said forged paper writing may be received as legal proof, and is of the purport and effect following: [here insert a copy of the forged certificate]."

No. 2. FORGING A CHECK AND UTTERING THE SAME
(Code, § 4489.)

DESCRIPTION:

"did feloniously forge a certain order for the payment of money, commonly called a check, purporting to be the order or draft of E. F. upon the Pulaski National Bank (or other bank) for the payment of ——— dollars, and did then and there feloniously utter and attempt to employ the same as a true and genuine check, he the said C. D. then and there well knowing the same to be forged, with intent thereby to defraud."

No. 3. FORGING A PROMISSORY NOTE
(*Idem.*)

DESCRIPTION:

"did feloniously forge a certain note, commonly called a promissory note, for the payment of ——— dollars, purporting to have been signed by the said A. B., and to have been dated on the ——— day of ——— 192—, with intent thereby to defraud."

No. 4. FORGING A BOND
(*Idem.*)

DESCRIPTION:

"did feloniously forge a certain bond for the payment of ———"

dollars, purporting to have been signed and sealed by the said A. B. and to have been dated on the — day of —, 192—, with intent thereby to defraud.”

No. 5. FORGING A RECEIPT

(*Idem.*)

DESCRIPTION:

“did feloniously forge a certain receipt, purporting to be the receipt of the said A. B., for the payment of — dollars by the said C. D., and purporting the date of the — day of —, 192—, with the intent thereby to defraud.”

No. 6. FORGING AN ORDER AND UTTERING THE SAME

(*Idem.*)

DESCRIPTION:

“did feloniously forge, utter, and employ as true a certain paper writing, purporting to be an order drawn by J. M. on the said A. B. in favor of the said C. D., for the payment of — dollars, and purporting to be dated on the — day of —, 192—, he the said C. D. then and there well knowing the said order to be forged, with intent thereby to defraud.”

No. 7. FORGING AN ACCEPTANCE OF A BILL OF EXCHANGE

(*Idem.*)

DESCRIPTION:

“did feloniously forge the acceptance of a certain bill of exchange, dated on the — day of —, 192—, for the payment of — dollars, purporting to be the acceptance of one E. F., with intent thereby to defraud.”

No. 8. FORGING A WILL

(*Idem.*)

DESCRIPTION:

“did feloniously forge a certain will and testament, purporting to be the last will and testament of one E. F., deceased, and purporting to be dated on the — day of —, 192—, with intent thereby to defraud.”

FORTHCOMING BOND

See "Attachments", div. II., under title *Justice of the Peace*; "Distress Warrant," div. IV., under *Justice of the Peace*; *Interpleader*; "Warrants for Small Claims," div. I., under *Justice of the Peace*

- § 1. When and how taken; its effect
- § 2. If forfeited, where returned; clerk's endorsement; force of judgment
- § 3. Liability of obligors and how recovery had
- § 4. Remedy of creditor, if bond quashed
- § 5. Jurisdiction of justice of forfeited forthcoming bond
- § 6. How bond withdrawn from clerk's office
- § 7. Forms under "Forthcoming Bond"

§ 1. When and how taken; its effect.—A forthcoming or delivery bond is one taken by a sheriff or other officer levying an execution, or distress warrant, from a debtor, with sufficient surety, payable to the creditor, reciting the service of the execution or warrant, and the amount due thereon (including all lawful charges of the officer), with condition that the property shall be forthcoming at the day and place of sale; whereupon, the property remains in the debtor's possession and at his risk (Code, § 6518).

But no such bond is to be taken on an execution on a forthcoming bond, nor on a judgment against certain officers, or deputies, or sureties, for money received, etc., and on every execution on which a forthcoming bond is thus prohibited, the clerk shall endorse, "no security is to be taken," and in any case of such endorsement no forthcoming bond shall be taken thereon (Code, §§ 6524-5).

§ 2. If forfeited, where returned; clerk's endorsement; force of a judgment.—If the condition of the bond is not performed, it is said to be forfeited, and the officer, unless the full amount due thereon is paid, must within 60 days after its forfeiture, return it, with the execution or warrant, to the clerk's office, and the clerk endorses on it the date of its return, and records its date, return, penalty, amount due thereon, and names of parties (for which he charges 30 cents); and against such of the obligors therein as may be alive when it is forfeited and so returned, it has the force of a judgment, and is a lien on the obligor's real estate, but no execution shall issue thereon (Code, §§ 6520, 6527).

§ 3. Liability of obligors and how recovery had.—They are liable for the money therein mentioned, with interest from date, and the costs. The obligee or his administrator or executor may recover the same by action or motion. (Code, § 6521.)

§ 4. Remedy of creditor, if bond quashed.—If the bond be quashed, the obligee, besides his remedy against the officer, may have such execution on his judgment, or issue such distress warrant, as would have been lawful if such bond had not been taken, (Code, § 6523).

§ 5. Jurisdiction of justice of forfeited forthcoming bond.—A justice may, on motion, after 10 days' notice, give judgment on such a bond taken upon an execution issued by a justice; but if the amount actually due thereon, exclusive of interest, exceeds \$20, the justice shall upon application and affidavit of substantial defense, at any time before trial, remove the case to court, where it shall be docketed and tried as an original motion therein, and no order of continuance from day to day or from one term to another is necessary (Code, § 6526). The justice on giving judgment includes in the costs the 30 cents fee for the clerk (Code, § 6529).

The justice must keep a record of his judgments on forthcoming bonds, as in other cases. No stay of execution is allowed, and he must endorse on the execution, "no security is to be taken" (Code, § 6530).

§ 6. How bond withdrawn from clerk's office.—The clerk endorses on the bond his fee (30 cents), and the obligee or his agent may, at any time after the record made as above (section 2), withdraw the same from the clerk's office, leaving a copy attested by the clerk (Code, § 6528).

§ 7. Forms under "Forthcoming Bond".—

NO. 1. FORTHCOMING BOND UNDER EXECUTION OR DISTRESS WARRANT.
[See No. 13, under *Bonds*.]

NO. 2. FORTHCOMING BOND UNDER ATTACHMENT.
[See No. 13, under *Bonds*.]

NO. 3. FORTHCOMING BOND UNDER ATTACHMENT.
[See No. 6, under *Interpleader*.]

No. 4. NOTICE OF MOTION AGAINST OFFICER FOR FAILURE TO RETURN
FORFEITED FORTHCOMING BOND

[See No. 3, under *Sheriffs, Sergeants, etc.*]

No. 5. NOTICE OF MOTION ON FORTHCOMING BOND
(Code, §§ 6521, 6526.)

To Messrs. D. D. and S. S.:

Whereas a bond was executed by you to X. Y., sheriff of _____ county, on the _____ day of _____, 192—, in the penalty of _____ dollars, with a condition whereby, after reciting that, upon a judgment obtained by me, in the circuit court of said county (or *before J. T., a justice of said county*), against the said D. D., I had sued out a writ of *fiert facias*, directed to X. Y., sheriff (or *constable*) of said county, by virtue whereof certain goods and chattels had been taken by J. R., deputy for X. Y., the said sheriff (or *by the said constable*), to satisfy the said execution, the amount whereof, at the date of the said bond, including the officer's fees, and commissions (and other lawful charges, if any), was _____ dollars, it was provided, that if the said D. D. should have the said goods and chattels forthcoming at the day and place appointed for the sale thereof, the said obligation should be void; and the said D. D. having failed to deliver the said goods and chattels according to the condition of the said bond, or to pay the amount due on said execution:

Notice is hereby given to each of you that on the _____ day of next _____ term of the circuit court of _____ county (or *on the _____ day of _____ 192— at _____, in said county, at _____ a. m. (or p. m.), of that day*), I shall move the said court (or *before J. T., a justice of said county*) to award execution upon the said bond, in my behalf, against you, and each of you, for principal, interests and costs.

This _____ day of _____, 192—.

P. P.

FRAUDS

(From "Hawkins Legal Counselor," pp. 297-8.)

See *Cheats, False Pretenses, Deceits, and Other Frauds; Contracts; Conveyances; Fraudulent and Voluntary Conveyance; Set-offs*

- § 1. Fraud in general
- § 2. Actual frauds; constructive frauds
- § 3. Fraud in contracting

- § 4. Proof of fraud
- § 5. Frauds as criminal offenses
- § 6. Statute of frauds

§ 1. **Fraud in general**.—Fraud is said to vitiate everything it touches. It contaminates and renders void all contracts and transactions so far as concerns the party against whom the fraud is committed. Covin and collusion are combinations amongst two or more to work a fraud upon another, and deceit, another means of perpetrating fraud, exists where there is a misrepresentation or contrivance by words or acts to deceive a third person who relying thereupon without carelessness or neglect on his own part sustains damage thereby. If the party misrepresenting, however, was himself mistaken no blame can attach to him. Such fraud may occur by a deliberate assertion of a falsehood to the injury of another or by failure to disclose a latent defect or by concealing an apparent defect, but the party deceived must have been in such situation as to have no means of detecting the deceit. (See *Caveat Emptor*.) Where there is a combination of two or more to practice fraud upon another they may be indicted for conspiracy. If two enter into a fraudulent scheme and one secures all the profits the other cannot recover a share from him.

§ 2. **Actual frauds; constructive frauds**.—There are actual or positive frauds and legal or constructive frauds, the former existing where there is intentional and successful employment of any cunning deception or artifice used to circumvent or deceive another, and the latter where the injury does not originate in any actual or evil design or contrivance to perpetrate a fraud, but where nevertheless the contract or act has a tendency to deceive or mislead others or to violate public or private confidence, and is consequently prohibited by law as a matter of policy.

Among constructive frauds may be noted cases arising from some particular confidential or fiduciary relation between the parties where advantage is taken of that relation by the person in whom the trust or confidence is reposed, as in case of a guardian or trustee or by third persons with his consent yet without actual intent to cheat, also agreements and other acts of parties which operate virtually to delay, defraud and

deceive creditors though not so actually intended, also purchases of property with full notice of the claim of legal or equitable title of other persons to the same in which case even though the purchaser may at the time deem the claim invalid, yet if it be valid a fraud would be perpetrated upon the one holding it if it were not maintained as against the purchaser; also so called voluntary conveyances of real estate, that is, conveyances without valuable consideration, as affecting the title and rights of subsequent purchasers and of creditors of the grantor. (See *Fraudulent & Voluntary Conveyances*, section 9.) There may even be an unintentional misrepresentation as to a state of facts which if acted upon would amount to a legal or constructive fraud, and in which the evil results of the misrepresentation must fall upon the party responsible for them.

As to actual or positive frauds they include suppressions of material facts which one party is legally or equitably bound to disclose to another; all cases of unconscionable advantage in bargains obtained by imposition, circumvention and undue influence over persons in general and especially over those who are by reason of age, infirmity, idiocy, lunacy, drunkenness or other incapacity unable to take care of and protect their own rights and interests; bargains of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition or undue influence when the decree of the court can place the parties in their former positions; cases of surprise and sudden action without due deliberation of which one party improperly takes advantage; cases of fraudulent suppression or destruction of deeds and other instruments to the injury of others and in violation of their rights; fraudulent awards with intent to do injustice; fraudulent prevention of acts to be done for the benefit of others through false statement or false promises; frauds in relation to trusts of a secret or special nature; frauds in verdicts, judgments and other judicial proceedings; in the confusion of boundaries of estate and matters of partition and dower; in the administration of charities, upon creditors and other third parties having equitable rights; and misrepresentations of material facts by word or deed by which one exercising reasonable discretion and confidence is misled to his injury, whether the misrepresentation be known to be false or only not known to

be true. In all such and other cases of fraud courts of equity will grant relief if there be no remedy in a court of law.

§ 3. **Fraud in contracting.**—Fraud in its ordinary application to cases of contract includes any trick or artifice employed by one to induce another to fall into or keep him in error so that he may make an agreement contrary to his interest, and it may consist in either misrepresenting or concealing material facts and may be effected by words or by actions but neither law nor equity will relieve one who has not himself exercised a due degree of caution. While cunning and circumvention are frowned upon, yet vigilance is exacted commensurate somewhat with the party's ability, yet if a person misrepresents or conceals a material fact which is particularly within his own knowledge, even if it be within the reach of the other party, yet in such way as to induce him to refrain from inquiry and from informing himself regarding the transaction, such transaction would be void on the ground of fraud, and concealment of a matter which may disable another party from performing the contract is a fraud if injurious to the other party.

Though a fraudulent contract is void from the beginning as against any party intended to be defrauded or against the public if it be interested, yet the party committing the fraud cannot avoid the contract and may be held to it or be held accountable for damages for the breach thereof by any party in interest desiring to so hold him. For badges of frauds, see *Fraudulent, etc., Conveyances*, section 9, (2).

§ 4. **Proof of fraud.**—There is more latitude of proof in equity with respect to fraud than in law. Ordinarily misrepresentation as to a fact the truth or falsehood of which the other party has an opportunity of ascertaining, or the concealment of a matter which a person of ordinary skill or vigilance might discover, does not constitute fraud, nor does misrepresentation as to the legal effect of an agreement, every man of mature discretion being presumed to know the legal effect of an instrument which he signs or of an act which he performs. It is deception as to facts which operates as fraud.

Frauds are almost infinite in kind and are scarcely limited by any rule or definition. Fraud may be shown from actual facts and circumstances of imposition, from the intrinsic na-

ture and subject matter of the bargain itself, that is, if it be of such character as no man in his sense and not under delusion or imposition would make on the one hand and no honest or fair man would accept on the other, also from circumstances and conditions of the parties, for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance, also from the nature and circumstances of the transaction with respect to third parties and its being an imposition upon them, as for example, creditors of one of the original parties to the contract, or to the transfer of property, as the case may be.

§ 5. **Frauds as criminal offenses.**—Some frauds are punishable criminally, usually under some statute, such as uttering a fictitious bank bill, selling unwholesome provisions, rendering false accounts and other wrongful acts by persons in official positions, cheating by false weights and measures and in general fraudulently obtaining the property of another by deceitful or illegal practice, as for example, where one falsely pretends that he owns property and thereby obtains credit on purchases. (See *Cheats, False Pretences, Deceits, and Other Frauds.*)

§ 6. **Statute of frauds.**—See *Contracts*, section 4.

FRAUDULENT AND VOLUNTARY CONVEYANCE

See Assignment for Benefit of Creditors

I. FRAUDULENT CONVEYANCES

- § 1. Statute of "fraudulent conveyances"
- § 2. Such conveyance is valid between the parties
- § 3. What "creditors" are protected by the statutes of fraudulent and voluntary conveyances
- § 4. What "purchasers" are protected by the statutes of fraudulent and voluntary conveyances
- § 5. What is a valuable consideration under statutes of fraudulent and voluntary conveyances
- § 6. What "other persons" are protected by the statute
- § 7. Conveyance before marriage in fraud of dower of curtesy
- § 8. Conveyance by husband to wife

- § 9. What amounts to fraud
 - (1) What fraudulent intent necessary
 - (2) Badges of fraud
 - (3) Fraudulent assignments
- § 10. Lien of attacking creditors and how paid; personal decree for balance

II. VOLUNTARY CONVEYANCES

- § 11. Statute of "voluntary conveyances"
- § 12. What "creditors" are protected by the statute
- § 13. Matters under "fraudulent conveyances" applicable to "voluntary conveyances"
- § 14. Limitation of suits to avoid voluntary deed, etc.

Of conveyances void in their execution as to third persons, there are two classes:

I. FRAUDULENT CONVEYANCES

§ 1. Statute of "fraudulent conveyances."—By section 5184 of the Code: "Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment, or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully entitled to, shall, as to such creditors, purchasers, or other persons, their representatives, or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

§ 2. Such conveyance is valid between the parties.—As between the parties and persons claiming under them, the conveyance (though fraudulent as to others) is valid and binding. The statute avoids the conveyance only as to the creditors, purchasers, and other persons when the grantor designed to hinder, delay or defraud by it.

So a fraudulent grantor cannot recover property from a fraudulent grantee, as, where a father, indebted, fraudulently conveys to a son (102 Va. 880; 101 Va. 77; 83 Va. 775).

And the same is true as to voluntary conveyances—they are valid between the parties.

§ 3. What "creditors" are protected by the statutes of

fraudulent and voluntary conveyances.—"Creditors" embraces general creditors, or creditors at large, subsequent as well as existing creditors (121 Va. 331), and lien creditors (as, by judgment, attachment, execution, etc.), for section 5186 of the Code provides that a creditor before obtaining a judgment or decree, whether the claim is due and payable or not, may sue to set aside the conveyance, assignment or transfer or charge upon the estate; and he has a lien from the bringing of his suit or filing his petition; but the lien shall not be valid as against a subsequent *bona fide* purchaser of real or personal estate for valuable consideration until and except from the time a memorandum or *lis pendens* has been recorded and indexed as provided by law—see *Lis Pendens*.

If a general creditor takes a mortgage or deed of trust, he no longer is considered a creditor, but is in law a "purchaser"—see next section.

By another section (5200), "creditors" are not restricted to creditors of the grantor, but embraces all creditors who, but for the deed or writing, would have had a right to subject the property to their debts (see 6 Grat. 154; 23 Grat. 737; 100 Va. 101).

But no one claiming as an administrator or executor of the grantor, or under a voluntary assignment for the benefit of creditors (he being a volunteer under the grantor in either case—i. e., taking without consideration) has any other rights than the grantor himself had, and so cannot set aside a previous fraudulent conveyance of such grantor (5 Munf. 28).

A creditor who successfully attacks one fraudulent debt in a deed of trust, does not take his place, but his lien dates from the bringing of his suit; the deed of trust stands valid as to other *bona fide* debts (95 Va. 276). If completely fraudulent, the property is treated as if the deed had never been made (94 Va. 315).

But a creditor's rights do not prevail as against a purchaser for value from the voluntary or fraudulent grantee, unless it appear, as the statute (§ 5184) says, "he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." (2 M's Real Prop., § 1171.)

§ 4. What "purchasers" are protected by the statutes

of fraudulent and voluntary conveyances.—Section 5200 of the Code says that the statute of fraudulent or voluntary conveyance shall embrace all purchasers, who, but for the fraudulent deed or writing, would have had title to the property or a right to subject it to their debt.

A creditor under a deed of trust or mortgage is in law a "purchaser," and not a creditor; so also is a creditor who takes a conveyance in payment of a pre-existing debt (2 Leigh 84; 13 Grat. 437; 15 Grat. 153; 30 Grat. 297). But one buying at a judicial sale made for the benefit of a creditor, is not a purchaser, but simply succeeds to the rights of the creditor.

It matters not from whom the defrauded purchaser derives his title, whether from the fraudulent grantor, or from some one claiming under him.

The statute of fraudulent conveyances expressly says, it "shall not affect the title of a purchaser for valuable consideration, unless he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." A voluntary conveyance (i. e., one made without consideration), though made fraudulently, cannot be defeated by a subsequent voluntary deed, nor by a will, for such a holder is not a purchaser for value.

An intent to deceive and defraud creditors, does not invalidate the conveyance as to purchasers,—the intent must be to defraud purchasers (1 Rob. 499, 539-40).

The purchaser protected is the "complete purchaser," that is, one has paid all the consideration (not merely secured it to be paid) and has acquired his conveyance (or at least the right to call for it), before he has notice of the fraud (Code, § 5200). (2 M's Real Prop., § 1172.)

§ 5. What is a valuable consideration under statutes of fraudulent and voluntary conveyances.—The statute of fraudulent conveyances (see section 1, above) says the statute shall not affect the title of a purchaser for "valuable consideration," without notice of the fraud; and the statute of voluntary conveyances says the conveyance, etc., not upon "consideration deemed valuable in law," or upon consideration of marriage, is void as to creditors. So a valuable consideration and want of notice is a good defense in a suit to set aside a conveyance for actual fraud; and a valuable consideration

alone is a good defense where the conveyance is attacked for being voluntary.

If the consideration is so grossly inadequate as to shock the conscience of a person of common sense, it is not sufficient, but is itself a proof of fraud (2 Leigh 149; 3 Leigh 367; 9 Grat. 930); but in the case of a suit to set aside a voluntary conveyance, if the consideration is clearly inadequate, or materially short, a court of equity will treat the conveyance as void as to the excess in value, allowing it to stand as security for the actual value of the consideration (26 Grat. 934).

A contemplated marriage of the parties or of any of their children is a valuable consideration sufficient under the statute of fraudulent conveyances (29 Grat. 628, 636; 90 Va. 683; 92 Va., 188), but not under the statute of voluntary conveyances, it being expressly excluded.

A conveyance to, or post-nuptial settlement upon, the wife by the husband, in consideration of her relinquishment (not a mere verbal promise to relinquish) of her contingent right of dower, or of other property, or, in case of separation, of her right to support and maintenance,—is supported by a valuable consideration (98 Va. 284; 76 Va. 764; 17 Grat. 92; 15 Grat. 368; 8 Grat. 166). (2 M's Real Prop., §§ 1180-2.)

Illegal considerations are not valuable considerations,—such as are immoral (as, illicit cohabitation), or are in unreasonable restraint of trade, or are against freedom of marriage, or are contrary to some positive rule of law or statute—see *Conditions of Conveyances*.

§ 6. What "other persons" are protected by the statute.—The statute of fraudulent conveyances (see section 1, above) avoids such conveyances as against, not only "creditors" and "purchasers," but also "other persons" who may be defrauded "of or from what they are or may be lawfully entitled to."

"Other persons" gives protection to a plaintiff in an action for damages for a tort or injury to the person or property, as, for seduction, adultery, etc., or for a breach of a contract (1 Rob. 136; 6 Grat. 154; 7 Grat. 26); or to a plaintiff in a suit for divorce and alimony, etc., and to set aside the husband's conveyance as fraudulent (99 Va. 746). (2 M's Real Prop., § 1171.)

§ 7. Conveyance before marriage in fraud of dower or

curtesy.—A conveyance by an unmarried woman, in contemplation of marriage, without the intended husband's knowledge, unless to secure a just debt or to provide for the children of a previous marriage, is in fraud of his right to curtesy (see *Curtesy*), and therefore may be set aside; so likewise as to a conveyance thus made by the husband in fraud of her right to dower, even though made as a provision for a child by a former marriage, or a mother or other relative. (106 Va. 564; 6 Grat. 332; 2 Leigh, 332.)

§ 8. **Conveyance by husband to wife.**—In a contest between the creditors of an insolvent husband and the wife, as to a conveyance to the wife from the husband, or from others with means furnished by him, the conveyance is *prima facie* presumed to be actually fraudulent, and the burden rests upon the wife or those claiming under her to repel the presumption and show by clear and satisfactory evidence that the consideration was paid by her *bona fide*, or in case of a settlement upon her, that he retained ample assets to satisfy his existing creditors (106 Va. 522; 105 Va. 628; 103 Va. 81, 265; 101 Va. 188; 100 Va. 190; 98 Va. 663; 97 Va. 565; 94 Va. 618, 716); but if the husband is not indebted at the time, no such presumption arises, and the burden is on the subsequent creditor to show that a prospective fraud was contemplated and directed against him (105 Va. 628).

Under the statute of "voluntary conveyances" (see section 11, below), a conveyance in consideration of marriage, or an ante-nuptial settlement, is void as to existing creditors; or if he is indebted at the time there is a *prima facie* presumption of fraud against subsequent creditors (105 Va. 632; 107 Va. 628). As to conveyances after marriage, or post-nuptial settlements, without consideration, by an insolvent husband, it is *prima facie* presumed to be voluntary and void, and the burden of rebutting the presumption rests upon her (84 Va. 810; 85 Va. 42; 87 Va. 404; 90 Va. 626; 93 Va. 341-2; 94 Va. 716; 98 Va. 9; 105 Va. 628).

The statute of voluntary conveyances does not cover the case of a purchaser in consideration of marriage (that being a valuable consideration), without notice of the fraud, or any case of a purchaser for value, without notice, who has a good defense against existing creditors (96 Va. 479).

§ 9. What amounts to fraud.

(1) *What fraudulent intent necessary.*—A fraudulent intent in both parties, grantor and grantee, is required; the grantee must be party to the fraudulent design and collude with him in accomplishing it; for if he had no notice of grantor's design and has paid a valuable consideration, the conveyance is unimpeachable. Positive knowledge on the grantor's part need not be shown, but only knowledge of facts and circumstances sufficient to excite suspicion in the mind of a person of ordinary care and prudence, and prompt him to inquire into the transaction, which would necessarily lead to the discovery of the fraudulent intent (94 Va. 308; 94 Va. 703; 97 Va. 195).

A conveyance not fraudulent when made cannot become so afterwards. (2 M's Real Prop., § 1173.)

(2) *Badges of fraud.*—The usual badges of fraud are, gross inadequacy of price; no security; unusual length of credit; bonds taken at long periods; conveyance in satisfaction of debt of father to son, they residing together; threats and pendency of suits; concealment of the transaction; keeping the conveyance a considerable time, unacknowledged and unregistered; grantor remaining in possession; absence of itemized accounts, and of vouchers; contradiction in the statements of the grantor and grantee; want of means by the grantor to create the alleged indebtedness; and failure to examine as witnesses persons having had opportunity to know the facts. Any of these may make a *prima facie* case of fraud, which will call upon the parties for an explanation, and all combined will generally suffice to show fraud as to all parties (83 Va. 491).

These are not necessarily badges of fraud: That the defendant, pending actions against him, threatens to protect himself, if they are pressed, and to make an assignment postponing the claims of the suing creditors; that the bonds of the preferred creditors are dated back without their knowledge; that the grantor is to retain possession and take the profits until such bonds mature 11 months afterwards; that the grantor secures the debt of the suing creditor on condition of the release of one-half thereof, etc. (85 Va. 955).

A conveyance by a father, heavily indebted, and with a damage suit pending, of all his property to a son for an im-

probable cash payment, and deferred payments without interest through 15 years, with the son's agreement to provide maintenance for his father and mother during their lives, is fraudulent, unless satisfactorily explained, especially if the son is not examined as a witness (77 Va. 827). (2 M's Real Prop., § 1174.)

(3) *Fraudulent assignments.*—In an assignment by an insolvent debtor purporting to convey all his property, any reservation of benefit to himself or provisions giving him control over the property, proceeds, or profits, so as to enable him to defeat the conveyance; or reserving the power to revoke the conveyance; or selecting as trustee one disqualified; or stipulating for the maintenance of the grantor or his family, or for his employment at a fixed salary,—all these will render the assignment fraudulent (97 Va. 550).

As to a release clause in an assignment, it is permissible, where all his property is conveyed, to provide that those who avail themselves of the deed shall release so much of their debts as are not satisfied by its proceeds (8 Leigh 272; 1 Grat. 274; 8 Grat. 457; 94 Va. 594; 97 Va. 560; 105 Va. 843).

A release clause accepted by the creditors does not affect any other security held by a creditor (94 Va. 594).

Of course the debtor, in an assignment, may except such property as is exempt, as, the homestead and poor debtor's exemption.

As to preferences, except so far as prohibited by the Bankruptcy Act of Congress, it is not illegal to prefer one creditor to another (neither having any lien), in a deed of assignment, provided there is no design to secure some fraudulent or illegal pecuniary benefit or advantage therefrom to the debtor himself; and this, though the motive be to get even with those who pressed him too hard (106 Va. 39, 756; 103 Va. 36; 94 Va. 594; 85 Va. 955).

An assignment may be void for fraud as to some and valid as to others not intended to be defrauded (8 Leigh 272; 95 Va. 276); though it is not necessary to show a direct, conscious intent to defraud each personally, if the general intent is present; but if the circumstances show there was no such intent actually to defraud a particular creditor, he, it seems,

cannot attack the deed (92 Va. 188; 98 Va. 666). (2 M's Real Prop., §§ 1175-8.)

§ 10. Lien of attacking creditors and how paid; personal decree for balance.—Section 5186 of the Code provides that in suits to avoid fraudulent or voluntary conveyances, the creditor has a lien from the time of bringing his suit on all the real and personal estate, and a petitioning creditor has a lien thereon from the time of filing his petition; and if the proceeds of sale will not pay all the liens acquired at the same time, they shall be applied rotably to such liens, and the court may make a personal decree against the debtor for any deficiency on the claim of any creditor after applying thereto his share of the proceeds of sale, or if he be not entitled to share in such proceeds, may render a personal decree against the debtor for the full amount of the creditor's claim.

Where a decree is against several voluntary grantees (i. e., grantees without consideration), contribution will be ordered among them so that each will pay his just proportion; but all are liable for any one failing to pay his part, until the debt is completely paid (2 Rand. 384; 28 Grat. 825, 829-30; 31 Grat. 620; 33 Grat. 507).

A voluntary grantee, without actual fraud, though in possession, is not accountable for rents and profits prior to the decree, now for the property itself or its value if it has been sold or rented or accidentally destroyed prior to the filing of the suit; but otherwise where there is actual fraud (2 Leigh, 30; 1 Grat. 289; 2 Grat. 73, 419; 5 Grat. 80).

II. VOLUNTARY CONVEYANCE

§ 11. Statute of "voluntary conveyances".—By section 5185 of the Code: "Every gift, conveyance, assignment, transfer, or charge, which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account, merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made; and though it be decreed to be void as to prior creditors, because voluntary or upon consideration of marriage, it shall not, for that cause, be decreed to be void as to subsequent creditors or purchasers."

§ 12. What "creditors" are protected by the statute.—A voluntary conveyance (i. e., one without consideration), in the absence of an actual fraudulent intent, is good as to subsequent creditors and purchasers, but voidable as to existing or prior creditors. But if the grantor is indebted at the time, there is a *prima facie* presumption that the deed (being voluntary) is fraudulent as to subsequent creditors, though this may be repelled; and if the grantor be not indebted, the presumption is that there is no fraud, but this may be repelled by showing he immediately went heavily in debt, or by other proof (105 Va. 632; 122 Va. 588).

For further as to the "creditors" embraced by the statute, see section 3, above.

§ 13. Matters under "fraudulent conveyances" applicable to "voluntary conveyances".—For validity of conveyances between the parties, see section 2, above; what "purchasers" are protected, section 4; what is a valuable consideration, section 5; conveyance by husband to wife, section 8; lien of attacking creditors, section 10.

§ 14. Limitation of suits to avoid voluntary deeds, etc.—If the suit is merely on the ground that the conveyance, etc., is voluntary or upon consideration of marriage, it must be brought, etc., within 5 years from the recordation of the conveyance, etc., if recorded under a law providing for its recordation, and if not so recorded, then within 5 years from the time the same was or should have been discovered (Code, § 5820).

This limitation does not apply where fraud is also relied upon (86 Va. 687).

Ignorance or mistake of the law does not affect contracts or conveyances; but ignorance in law of the title one proposes to convey or acquire is ground for relief (26 Grat. 470; 21 Grat. 313; 8 Grat. 70; 7 Grat. 86; 3 Grat. 193; 12 Leigh, 434; 6 Rand. 594).

FUGITIVES FROM JUSTICE

- § 1. Surrender of fugitives from other states
- § 2. When warrant of arrest to issue; its execution and return
- § 3. Proceeding before the justice after arrest
- § 4. The justice to inform the Governor; his duty
- § 5. Proceedings upon appearance of accused in court
- § 6. When and by whom he may be retaken
- § 7. Costs, how and by whom paid; what, if jailor not paid
- § 8. When fugitive to be detained here
- § 9. Rules of practice and forms for rendition of fugitives
- § 10. Forms adopted by the Interstate Extradition Conference

§ 1. Surrender of fugitives from other states.—By cl. 2. sec. 2, Art. IV, U. S. Const.: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

Virginia responds to this provision thus: By section 5061 of the Code: "Any person charged in another state of this Union with treason, felony, or other crime, who shall flee from justice and be found within this State, shall, on demand of the executive authority of the state from which he fled, made in the manner prescribed by the Constitution and laws of the United States, be delivered up according to the said Constitution and laws, to be removed to the state having jurisdiction of the crime."

In the supreme court of New York it has been held that by the use of the words "treason, felony, or other crime," the framers of the Constitution of the United States intended to provide a remedy which should reach every offense criminally cognizable by the laws of any of the states.

For the surrender by the Governor to a justice on requisition of the President, of fugitives from foreign nations, see Code, §§ 5059-60.

§ 2. When warrant of arrest to issue; its execution and return.—By section 5062 of the Code: "Whenever any person is found within this State charged with treason, felony or misdemeanor committed in any other state, any justice may, upon complaint on oath or other satisfactory evidence that such person committed the offense, issue a warrant to bring the person so charged before the same or some other

justice within the State, and the officer to whom such warrant is directed, may execute the same in any county or corporation in the State, and bring the party, when arrested, before any justice of the same or any other county or corporation."

Upon this subject the statutes of Massachusetts and Virginia are the same. It has been decided by the supreme court of the former state that this law is constitutional, and that a justice of the peace has authority under this section to issue a warrant to arrest a fugitive from justice from another state, upon the complaint on oath of the party alone preferring the charge.

§ 3. Proceeding before the justice after arrest.—By section 5063 of the Code: "When any person shall have been arrested and brought before a justice, under the provisions of the preceding section, and it shall appear to the justice before whom the person charged is brought that there is reasonable cause to believe that the complaint is true, he shall, if he would have been bailable by a justice, in case the offense had been committed in this State, be required to enter into a recognizance, with sufficient surety, in a reasonable sum, to appear before the circuit court of the county, or the corporation court of the city, or the justice before whom he is brought, on the first day of the next term thereof, or at a future day of said term, or at a future day before the judge of said circuit or corporation court in vacation, allowing a reasonable time to obtain the warrant of the Executive and to abide the order of the court, and if such person do not enter into such recognizance, he shall be committed to jail, and be there detained until the day named by the said justice in his warrant of commitment, when he shall be brought before the court or judge, which date shall be put in the mittimus when said party is committed to jail. The recognizance, if any, together with the warrant and proceedings thereon, shall be returned to the clerk of said court without delay, and if the prisoner has been held to appear before the judge of the court in vacation, the clerk shall immediately notify said judge, but if he is held to the first day of the next term of the court, or to any future day of said term, the clerk shall docket said case at the head of the criminal docket, and if the person entering into the recognizance fail

to appear according to the conditions thereof, his default shall be entered of record, and like proceedings be had as in cases of other recognizance entered into before a justice; but if such person would not have been bailable by a justice in case the offense had been committed in this State, he shall be committed to jail, and there detained until the day so appointed for his appearance before the said court, or judge thereof in vacation, and like proceedings thereon shall be had as is hereinbefore provided, where he is committed for failing to give bail."

§ 4. The justice to inform the Governor; his duty.—By section 5064 of the Code: "The justice, by whom such person is so recognized or committed, shall immediately, by letter, apprise the Governor of the fact, who shall thereupon communicate the same to the executive of the state where the crime is charged to have been committed."

§ 5 Proceedings upon appearance of accused in court.—By section 5065 of the Code: "If the person so recognized or committed, shall appear before the court on the day ordered, he shall be discharged, unless he shall be demanded by some person authorized by the warrant of the Governor to receive him, or unless the court see cause to commit him, or to require him to enter into a new recognizance for his appearance on some other day; and if, when ordered, he do not enter into such recognizance, he shall be committed and detained as before."

§ 6. When and by whom he may be retaken.—By latter part of section 5065: "But whether the person so charged shall be recognized, committed, or discharged, any person authorized by the warrant of the Governor may, at all times, take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape."

§ 7. Costs, how and by whom paid; what, if jailer not paid.—By section 5066 of the Code: "The complainant in in such case shall be answerable for all the actual costs and charges, and for the support, in jail, of any person so committed, to be paid in the same manner as by a creditor for his debtor committed on execution, and if the charge for his support in jail shall not be so paid, the jailor may discharge him in like manner as if he had been committed for debt on an execution." See Code, § 2878.

§ 8. When fugitive to be detained here.—By section 5067 of the Code: "No person under prosecution for any offense alleged to be committed within this State, shall be delivered up to the executive authority of another state, or of the United States, until such prosecution shall have been determined, and the person prosecuted shall have been punished if condemned; nor shall any person under recognizance to appear as a witness in any such prosecution, be so delivered up, until said prosecution be determined. Nor shall any person, who was in custody upon any execution or upon process in any suit, at the time of his arrest for a crime charged to have been committed without the jurisdiction of this State, be so delivered up without the consent of the plaintiff, in such execution or suit, until the amount of such execution shall have been paid, or until such person shall be otherwise discharged from such execution or process."

§ 9. Rules of practice and procedure for surrendering of fugitives.—[The following rules and forms for the rendition (or surrendering) of fugitives from justice were agreed upon at the Interstate Extradition Conference, at which Virginia and a number of other States were represented. It is believed that the Governors of practically all of the States in the Union now observe the same rules and forms.]

The application must be made by the District or Prosecuting Attorney for the county or district in which the offense was committed, and must be in duplicate original papers or certified copies thereof.

The following must appear by the certificate of the District or Prosecuting Attorney:

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in roman capital letters, for example: JOHN DOE.

(b) That in his opinion the ends of public justice require that the alleged criminal be brought to this State for trial at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person,

and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offense charged is not of recent occurrence a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretenses, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason be given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate (a notary public is not a magistrate within the meaning of the statutes) and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrants must be duly certified.

6. Upon the renewal of an application, for example: on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, new or certified copies of papers in conformity with the above rules must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

§ 10. Forms adopted by the Interstate Extradition Conference.

No. 1. FORM OF REQUISITION.

State of _____

The Governor of _____

To the Governor of _____

Whereas, It appears by _____, which _____ hereunto annexed and which I certify to be authentic and duly authenticated in accordance with the laws of this _____, that _____ stands charged with the crime of _____, which I certify to be _____ crime under the laws of this _____, committed in the county of _____ in this _____, and it having been represented to me that he has fled from the justice of this _____, and may have taken refuge in the _____.

Now, Therefore, pursuant to the provisions of the Constitution and the laws of the United States in such case made and provided, I do hereby require that the said _____ be apprehended and delivered to _____ who _____ hereby authorized to receive and convey _____ to the _____ of _____, there to be dealt with according to law.

In Witness Whereof, I have hereunto signed my name and affixed the _____ seal of the _____ at the Capitol in the _____, this _____ day of _____ in the year of our Lord 192—.

By the Governor: _____

No. 2. FORM OF WARRANT.

State of _____.

The Governor of _____

To _____

And the Sheriffs, under Sheriffs, and other officers of and in the several cities and counties of this _____:

Whereas, It has been represented to me by the Governor of _____ that _____ stands charged with the crime of _____, which he certifies to be crime under the laws of said _____, committed in the county of _____ in said _____, and that _____ ha fled from justice in said _____ and ha taken refuge in the _____, and the said Governor of _____ having, in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said _____ to be arrested and delivered to _____, who is duly authorized to receive _____ into his custody and convey _____ back to the said _____ of _____.

And whereas, the said representation and demand is accompanied by _____ whereby the said _____ shown to have been duly charged with the said crime and with having fled from said _____, and taken refuge in the _____ which _____ duly certified by the said Governor of _____ to be authentic and duly authenticated:

Wherefore, you are required to arrest and secure the said _____ wherever _____ may be found within the _____ and accord _____ such opportunity to sue out a writ of Habeas Corpus as is prescribed by the laws of this _____ and to thereafter deliver _____ into the custody of the said _____ to be taken back to the said _____ from which _____ fled, pursuant to the requisition; and also to return this warrant and make return to the Governor of _____ within thirty days from the date hereof, of all your proceedings had thereunder, and of all facts and circumstances relating thereto.

Given under my hand and the _____ seal of the _____, at the Capitol, in the _____ this _____ day of _____, in the year of our Lord 192—.

By the Governor: _____

No. 3. FORM OF AUTHORITY TO AGENT TO RECEIVE THE PRISONER
 State of _____

The Governor of _____

To All To Whom These Presents Shall Come:

Know Ye, That I have authorized and empowered and by these presents do authorize and empower _____ to take and receive from the proper authorities of the _____ fugitive from justice and convey _____ to the _____ of _____, there to be dealt with according to law.

In Witness Whereof, I have hereunto signed my name and affixed the _____ seal of the _____ at the Capitol in the _____ this _____ day of _____, in the year of our Lord 192—.

By the Governor: _____

No. 4. FORM OF ENFORCEMENT ON REQUISITION

I _____ do hereby certify that I have _____ day of _____ 192—, honored the requisition of the Governor of _____ for the surrender of _____ fugitive from the justice of said last named _____ and has issued a warrant for _____ delivery to _____, the agents of said _____ of _____, whose authority to receive said fugitive is annexed hereto.

In witness whereof, I have hereunto signed my name and affixed the _____ seal of the _____, at the Capitol, in the _____, this _____ day of _____, in the year of our Lord 192—.

By the Governor: _____

GAMBLING OR GAMING

- § 1. Keeping gaming bank, gaming tables, etc.; how punished; seizure of money, tables, etc.; money to be forfeited and tables, etc., burned
- § 2. Occupant of premises permitting gaming tables, gaming bank, etc., how punished
- § 3. Persons aiding as doorkeepers etc., how punished
- § 4. Betting or playing at faro or at the said games, or at any game except, etc., at a public place; how punished
- § 5. To prevent and punish betting, gambling, and making writing, or selling books or pools or mutuals on horse or other race or baseball or football game.
- § 6. Pool-selling, etc., on races out of State

- § 7. Entering or riding or driving horses where purses, premiums, or stakes are competed for
- § 8. Keeping or exhibiting slot machines
- § 9. Betting at any game
- § 10. Conducting game played for money or other thing
- § 11. Permitting unlawful gaming at house of entertainment, or place connected therewith
- § 12. Winning by cheating or other fraud
- § 13. Betting on election or appointment to office
- § 14. Lotteries and raffles
- § 15. "Bucketing" or "bucket-shopping," or unlawful dealing in securities
- § 16. Person prosecuted for unlawful gaming disqualified to testify against witness for State; witness for State exempt from such prosecution; compelled to testify, etc.
- § 17. Forms under "Gambling or Gaming"

§ 1. Keeping gaming bank, gaming tables, etc., how punished; seizure of money, tables, etc.; money to be forfeited and tables, etc., burned.—By section 4676, as amended by Acts 1920, p. 597: "If any person keep or exhibit, for the purpose of gaming, any gaming table or bank of any name or description whatever, or any table or bank used for gaming which has no name, wheel of fortune or slot machine, any pigeon-hole table or Jennie Lynn table, whether the game or table be played with cards, dice or otherwise, or be a partner or concerned in interest in the keeping or exhibiting such table or bank, he shall be confined in jail not less than two nor more than twelve months, and fined not less than one hundred nor more than one thousand dollars; provided, however, that nothing contained herein shall prevent any person from keeping and exhibiting any game or wheel upon any city, county or State fair grounds, benevolent bazaars, carnivals, and amusement parks, where the prize consists of fruit, candy, toys, or other novelties. Any such table, bank or wheel of fortune, and all the money, stakes or exhibits to allure persons to bet at such table, bank or wheel, may be seized by order of court, or under warrant of a justice, and the money so seized shall be forfeited, one-half to the person making the seizure, and the other half to the Commonwealth, and the table, bank, machine or wheel shall be burned."

§ 2. Occupant of premises permitting gaming tables, gaming bank, etc., how punished.—By section 4677 of the

Code: "If any person knowingly permit a gaming table, gaming bank or wheel of fortune, such as is mentioned in the preceding section, to be kept or exhibited on any premises in his occupation, or who shall keep a place resorted to for the purpose of gaming, or a place frequented for such purposes, or who shall reside in such place for such purposes, he shall be confined in jail not exceeding one year, and fined not less than \$100 nor more than \$1,000."

§ 3. Persons aiding as doorkeepers, etc., how punished.

—By section 4678 of the Code: "If any person act as doorkeeper, guard or watch, or employ another person to act as such, for a keeper or exhibitor of a gaming table, gaming bank, or wheel of fortune, or a place resorted to for the purpose of gaming, or resist, or by any means or device hinder or delay the lawful arrest of such keeper or exhibitor, or person conducting such place, or the seizure of the table, bank, wheel or money exhibited or staked thereat, or unlawfully take the same from the person seizing it, he shall be confined in jail not exceeding one year, and fined not exceeding \$1,000."

§ 4. Betting or playing at faro or at the said games, or at any game except, etc., at a public place, how punished.—By section 4679 of the Code: "If any person bet or play at any such table, bank or wheel of fortune as is mentioned in section 4676, or if at any ordinary, race field, store-house, tavern, inn, or other public house, or in any street, highway, or other public place, or in any out-house or other place where people resort for the purpose of gaming, he play at any game except billiards, gowls, chess, backgammon, drafts, dominoes or a licensed game, or bet on the sides of those who play, he shall be fined \$30 and shall, if required by the court, give security for his behavior for one year or in default thereof, shall be confined in jail not exceeding three months."

All houses and offices commonly known as public, and all gaming houses, are included within the meaning of the preceding section. Any room attached to such public house, and commonly used for gaming, is also included, whether the same be kept closed or open. But a business office after business hours, or a private residence, is not a public house or place, unless it be commonly used for gaming. (Code, § 4680.)

The offense is complete without proof of betting. (Code, § 4681.)

§ 5. To prevent and punish betting, gambling, and making, writing, or selling books or pools or mutuels on horse or other race or baseball or football game.—Punishment, fine \$200 to \$500 (one-fourth to the informer), and jail 30 to 90 days. (Code, § 4682.)

§ 6. Pool selling, etc., on races out of State.—Punishment, \$200 to \$500, and jail 30 to 90 days. (Code, § 4683.)

§ 7. Entering or riding or driving horses where purses, premiums, or stakes are competed for.—Punishment, fine \$50 to \$300, or jail 30 days to 6 months. (Code, § 4684.)

§ 8. Keeping or exhibiting slot machines.—By section 4685 of the Code: "If any person keep or exhibit, or be concerned in interest in keeping, or exhibiting any slot machine of any description into which are dropped pennies or nickels or coins of any other denominations, or other device that operates on the nickel-in-the-slot principle, in the operation of which said machine or device the element of chance enters in, or permit such machine or device to be kept or exhibited in his place of business, or any other place in this State, he shall be confined in jail not less than fifteen days nor more than sixty days and fined not less than \$100 nor more than \$500, and said machine or device shall be deemed gaming apparatus, and shall be embraced within the provisions of §§ 4820 to 4822, inclusive (as to search warrants), in so far as said sections relate to gaming apparatus. The possession of the aforesaid machine or device shall be *prima facie* evidence of the use thereof. This section shall not, however, apply to any slot machine or device that operates on the nickel-in-the-slot principle, in the operation of which said machine the element of chance does not enter, and which is used exclusively for any of the following purposes—to-wit: For conducting a pay telephone, for musical, weighing, or other similar purposes, or for disposing of cigars in which one or more cigars are sold with each nickel deposited in the slot machine or device that operates on the nickel-in-the-slot principle, or for the disposing of chewing gum or articles of merchandise other than cigarettes."

§ 9. Betting at any game.—By section 4686 of the Code: "Any person who shall bet, wager or play at any game for

money, or other thing of value, shall be fined not exceeding \$100, or confined in jail not exceeding sixty days, or both."

§ 19. Conducting game played for money or other thing.

—By section 4687 of the Code: "Any person who shall conduct or be interested in conducting any game played for money or other thing of value, or 'rake off' of any money or other thing of value from a pool made up by those who are engaged in playing cards or other game for money or other thing of value, whether said 'rake off' be for profit or for the necessary expenses of the game or for any other purposes whatever, or shall receive directly or indirectly any money or other thing of value as compensation for conducting such game or for furnishing the room or paraphernalia for such game, shall be guilty of a misdemeanor and shall be punished by confinement in jail not less than 6 months nor more than 12 months."

§ 11. Permitting unlawful gaming at house of entertainment, or place connected therewith.—By section 4688 of the Code: "If a keeper of ordinary (i. e., tavern) or house of entertainment permit unlawful gaming at his house or at any out-house, booth, arbor, or other place appurtenant thereto or held therewith, he shall be fined \$100, and shall forfeit his license and give surety for his good behavior for one year, or in default of such surety be confined in jail not exceeding four months."

"In a prosecution under the preceding section, if the gaming be proved, it shall be presumed it was permitted by the keeper of the house, unless it appear that he did not know of, or suspect such gaming, or that he endeavored to prevent it, and gave information of it, with the names of the players, to the next court of the county or corporation." (Code, § 4689.)

Letting out-house, or other appurtenant place for unlawful gaming is punishable in the same manner, and the lease is presumed, unless the contrary is shown. (Code, § 4690.)

§ 12. Winning by cheating or other fraud.—By section 4691 of the Code: "If any person playing at any game, or making a wager, or having share in any stake or wager, or betting on the hands or sides of others playing at any game, or making a wager, cheat, or by fraudulent means win or acquire for himself or another, money or other valuable thing,

he shall be confined in jail not exceeding one year, and fined not less than five times the value of the money or thing won or acquired."

§ 13. Betting on election or appointment to office.—By section 4692 of the Code: "If any person bet or wager money or other thing over the value of five dollars on any election or appointment to any office or place, to be made under authority of the Constitution and laws of this State, or of the United States, he shall be fined not less than the value of such money or thing, and not more than five times the value thereof."

§ 14. Lotteries and raffles.—By section 4693 of the Code: "If any person set up or promote, or be concerned in managing or drawing a lottery or raffle, for money or other thing of value, or knowingly permit, such lottery in any house under his control, or knowingly permit money or other property to be raffled for in such house, or to be won therein, by throwing or using dice, or by any other game of chance, or knowingly permit the sale in such house of any chance or ticket in or share of a ticket in a lottery, or any writing, certificate, bill, token, or other device purporting or intended to guarantee or assure to any person, or entitle him to a prize or share of, or interest in a prize to be drawn in a lottery, or for himself or another person, buy, sell, or transfer, or have in his possession for the purpose of sale, or with intent to exchange, negotiate, or transfer, or aid in selling, exchanging, negotiating, or transferring a chance or ticket in or share of a ticket in a lottery, or any such writing, certificate, bill, token, or device, he shall be confined in jail not exceeding one year, and fined not exceeding \$500."

"All money and things of value, drawn or proposed to be drawn by an inhabitant of this State and all money or things of value received by such person by reason of his being the owner or holder of a ticket or share of a ticket in any lottery or pretended lottery, contrary to this chapter, shall be forfeited to the Commonwealth, and may be seized by an officer and held to await proceedings for condemnation." (Code, § 4694.)

§ 15. "Bucketing" or "bucket-shopping," or unlawful dealing in securities.—See Code, §§ 4714-18.

§ 16. Person prosecuted for unlawful gaming disquali-

fiel to testify against witness for State; witness for State exempt from such prosecution; compelled to testify, etc.— By section 4780 of the Code: “No person prosecuted for unlawful gaming shall be competent to testify against a witness for the Commonwealth in such prosecution, touching any unlawful gaming committed by him prior to the commencement of such prosecution; nor shall any witness giving evidence, either before the grand jury or the court in such prosecution, be ever proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify, and for refusing to answer questions, may by the court be fined a sum not exceeding \$500, and be imprisoned for a term not exceeding six months.”

§ 17. Forms under “Gambling or Gaming”.—

No. 1. WARRANT OF ARREST FOR EXHIBITOR OR KEEPER OF A GAMING TABLE.

(Code, § 4676, as amended by Acts 1920, p. 597.)

DESCRIPTION:

“did keep and exhibit a certain gaming table, called faro bank (or A B C, or E O or other table).”

No. 2. WARRANT TO SEIZE MONEY EXHIBITED AT GAMING TABLE, AND ALSO TO SEIZE AND BURN THE TABLE.

(*Idem.*)

— county, to-wit:

To X. Y., constable of said county:

Whereas information on oath has this day been given to me, J. T., a justice of said county, by A. B., that one C. D. keeps and exhibits a certain gaming table, called faro bank (or other table), in a certain house occupied by him in said county, and that he does there exhibit money to allure other persons to bet at the said game of faro (or other game), and that persons do there stake and bet their money at the said game:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to enter the said house, and there seize the said gaming table and all the money there so exhibited and staked; and the said gaming table so seized you are hereby commanded publicly to burn and destroy, and the said money so seized you are required to account for and pay to the circuit court of said county, on the first day of the next term thereof; and make return to me how you have executed this my warrant.

Given under my hand and seal, this _____ day of _____, 192—.

J. T., J. P. [L. s.]

No. 3. WARRANT OF ARREST FOR OCCUPANT OF PREMISES PERMITTING
GAMING TABLES

(Code, § 4677.)

DESCRIPTION:

"did knowingly permit and suffer a certain gaming table called A B C table (or other table as the case may be), to be kept and exhibited by O. R., in a certain house, situated in said county, then occupied by him."

No. 4. WARRANT OF ARREST FOR AIDING KEEPERS OR EXHIBITORS OF
GAMING TABLES.

(Code, § 3817.)

DESCRIPTION:

"did act (or *did employ O. R. to act*) as doorkeeper (or *guard or watch*) for O. S., who then and there kept and exhibited a certain gaming table (or other table)."

No. 5. WARRANT OF ARREST FOR BETTING OR PLAYING AT A B C OR
OTHER GAMES OF THAT CLASS

(Code, § 4679.)

Follow No. 39, and insert the following:

DESCRIPTION:

"did bet (or *play*) at a certain gaming table, called *faro bank* (or other table)."

No. 6. WARRANT OF ARREST FOR BETTING OR PLAYING AT A PUBLIC PLACE
AT ANY GAME, EXCEPT BILLIARDS, BOWLS, CHESS, BACKGAMMON
DRAUGHTS, DOMINOES, OR A LICENSED GAME

(*Idem.*)

DESCRIPTION:

"at a public place, to-wit: at _____ (or at an *ordinary or race-field*) did play (or *bet on the side of those who played*), at a certain game of cards (or any other game, except billiards, &c.)."

No. 7. WARRANT OF ARREST FOR GAMBLING PRIVATELY

(Code, § 4686.)

DESCRIPTION:

"did unlawfully bet, wager, and play at a game of (name it) for money, and other things of value."

NO. 8. WARRANT OF ARREST FOR A KEEPER OF A HOUSE OF ENTERTAINMENT PERMITTING GAMING AT HIS HOUSE
(Code, §§ 4688-9.)

DESCRIPTION:

"then being a keeper of an ordinary (or a *tapern*, or other house of entertainment), did suffer and permit unlawful gaming at his said house, to wit: [here state what game was permitted]."

NO. 9. WARRANT OF ARREST FOR A KEEPER OF A HOUSE OF ENTERTAINMENT, FOR HIRING AN OUTHUSE FOR GAMBLING PURPOSES
(Code, § 4690.)

DESCRIPTION:

"then being a keeper of an ordinary (or a *tapern*, or other house of entertainment), did let and hire to one O. R. a certain house (or other place) appurtenant to and held with his said house, with intent that unlawful gambling should be permitted at said outhouse (or other place)."

NO. 10. WARRANT OF ARREST FOR WINNING BY CHEATING OR FRAUD, IN ANY GAME
(Code, § 4691.)

DESCRIPTION:

"in playing with said A. B. at a certain game, called quoits (or other game), did by fraudulent means win and acquire for himself from him the said A. B., ten dollars in money (or other property)."

NO. 11. WARRANT OF ARREST FOR BETTING MORE THAN FIVE DOLLARS ON AN ELECTION OR APPOINTMENT TO OFFICE
(Code, § 4692.)

DESCRIPTION:

"did bet and wager eight dollars with one O. R. that E. F. would be elected sheriff for said county at the election held on the ——— day of ———, 192—."

GATES

- § 1. When may be erected
- § 2. Leaving open gates; punishment
- § 3. Discontinuance of gates on public highways
- § 4. When board to appoint viewers to assess damages upon removal of gates

§ 1. When may be erected.—By section 2009 of the

Code: "Any person owning land over which another or others have a private road or right of way except where it is otherwise provided by contract may erect and maintain gates across such roads or right of way at all points at which fences extend to such roads on each side thereof."

§ 2. Leaving open gates; punishment.—To open and leave open, without permission of the owner, another's gate, or one established by order of court, or for a person, other than the owner of the lands through which a line of railroad runs, to open and leave open a gate at any public or private crossing of the right of way, of a railroad, is punishable by a fine of \$5 to \$20 to be recovered before a justice of the peace. (Code, § 4481, as amended by Acts 1918, p. 140, and § 2010.)

§ 3. Discontinuance of gates on public highways.—By section 2011 of the Code: "If it be suggested by any citizen of this State to the board of supervisors of the county in which such gate is that any injury or inconvenience results from any gate across a public road, the said board shall cause the owner of such gate to be summoned to appear at the next regular meeting of the board, and show cause why the same should not be discontinued; and upon the return of the order executed by any officer authorized to execute process, shall determine whether there ought to be such discontinuance or not. If the board decide that the gate shall be removed, it shall direct the proper road officer to remove the gate, and it shall be his duty so to do at such time as the board may direct."

§ 4. When board to appoint viewers to assess damages upon removal of gates.—By section 2012 of the Code: "Wherever a road is, or has been, established with gates and the gates are removed as ordered, and damages are claimed by the party owning the same, the board of supervisors shall appoint viewers to examine and report upon the nature and extent of the damages caused by such removal; and upon their report and other evidence, if any, the board may allow such damages as may appear to be proper, which shall be chargeable on the county or district. From any order of the board of supervisors entered under this or the preceding section, any party interested may after notice to the adverse party, appeal of right to the circuit court of the county within six

months from the date of such order. This and the preceding section shall apply to all the counties of the State, whether acting under a special road law or not."

GENERAL ASSEMBLY

For the duties and privileges of members and officers, and how Constitution amended, see Code, §§ 294-312, and Acts 1920, p. 396, amending § 306.

GINSING

Ginsing cannot be dug between March 15th and September 15th, except on one's own land, under penalty of \$5 to \$10, one-half to the informer. (Code, § 4710.)

GIFTS OF PERSONAL PROPERTY

See Conveyances; Will

- § 1. When gift of personal property invalid
- § 2. When gift invalid as to third persons
- § 3. Gifts by a person dying
 - (1) Definition
 - (2) Essentials of such a gift
 - (3) Difference between gifts *mortis causa* and gift among the living

§ 1. When gift of personal property invalid as between the parties.—By section 5142 of the Code: "No gift of any goods or chattels shall be valid, unless by deed or will, or unless actual possession shall have come to and remained with the donee, or some person claiming under him. If the

donor and donee reside together at the time of the gift, possession at the place of their residence shall not be a sufficient possession within the meaning of this section. This section shall not apply to the wife's paraphernalia." Not only must the property be delivered to the party, but must remain with him, or else there must be a deed or will, which, as between the parties need not be recorded. If not capable of actual literal delivery, there must be something equivalent to it. The donor or giver must part, not only with the possession, but the dominion, of the property. If it be a bond, note, or other writing not negotiable, or a future interest in personal property, there must be an assignment with the delivery, or some equivalent writing—see *Assignments*. The transfer must be actually executed; a verbal gift without delivery, or a mere intention to execute it, not being perfected, does not amount to a gift. (3 Min. Inst. 91.)

"Goods or chattels" means tangible personal property only and does not apply to bonds, notes, and other choses in action (right in action, as, to sue), or to a judgment (99 Va. 495; 122 Va. 10).

Also if the giver is a minor, insane, or there is fraud or deceit practiced on him or other illegality in the inducement which led to the gift, as being against public policy, such as illicit cohabitation, or the like, the gift, as in the case of conveyances of land, is invalid—see *Conveyances*, section 15. (3 Min. Inst. 91, 93.)

§ 2. When gift invalid as to third persons.—That is, as to creditors and purchasers. The law is the same in this respect, as to recordation of the writing, as in case of conveyances of land—see *Fraudulent and Voluntary Conveyances*.

§ 3. Gifts by a person dying.

(1) *Definition.*—A donation or gift *mortis causa*, as it is called, is a death-bed or testamentary disposition of personal property, with several of the attributes of a will and some of a gift among the living. It is a donation or gift where a person in his last sickness, apprehending his death near, delivers or causes to be delivered to another the possession of any personal goods to keep in case of his death by his present ailment. (3 Min. Inst. 601.)

(2) *Essentials of such a gift.*—(a) It must be made in

the last illness and with a view to and in peril of his death. If he was ill when the gift was made, and died within a few days or weeks afterwards of that illness, it will be presumed to have been made in contemplation of death.

(b) While the gift is conditioned on his death of that illness, yet it need not be express, but the law infers it, in the absence of evidence to the contrary. If, however, it appears from all the circumstances taken together that the gift was intended to be unconditional, whatever else it is, it is not a gift *mortis causa*.

(c) There must be a delivery of the subject of the gift, either to the donee himself or to some one else for his use. Where the subject is capable of corporeal or actual delivery, and in case of a purse, ring, jewel, watch, or the like, the possession must be transferred in point of fact to the hands of the donee, either by the donor or by his order. It is not sufficient to write upon the parcels, the names of the persons, with a request to a third person to deliver them; or to desire a person to take a sum from its place of deposit and divide it among the donor's children; nor to tell the donee that all the furniture then in the house is his, in the event of the donor's death. Nor is it sufficient that the possession was in the donee, whether after-acquired, by himself, or previously and continuing by the donor's authority, but it is the delivery to him by the donor that is material.

Where the nature of the thing does not admit of corporeal or actual delivery the delivery of the means of gaining possession or making use of the thing given, will suffice, as, of a writing, or key to a trunk or warehouse where the articles are deposited—not as a symbol of delivery, but as the way or means of coming at the possession or use of the thing.

Bonds, notes, deeds of trust, and other evidences of debt on the part of a third person, are subjects of valid gifts *mortis causa*.

Where the subject is one which cannot be transferred by delivery, as, a certificate of bank stock not endorsed by the donor (the owner), the legal title cannot be transferred by gift *mortis causa*, yet equity will pass the title, as in the case of a bond or promissory note. Other instances of subjects not capable of transfer by delivery are voluntary promissory notes,

checks or other promises without consideration, not under seal, executed by the donor himself and delivered to the donee. (3 Min. Inst. 601-5.)

(3) *Difference between gifts mortis causa and gifts among the living.*—The former may be revoked during the donor's lifetime, either by his recovery or resuming possession, but it cannot be revoked by a subsequent will, for as long as possession remains in the donee the property belongs to him conditionally, and not to the donor. Yet it may be satisfied by a legacy to the donee. It is liable to the donor's debts, upon deficiency of assets. (3 Min. Inst. 605-6.)

GROUND RENT

Ground rent is rent paid for the privilege of building on another man's land or rent reserved to himself and heirs, by the grantor of land in fee-simple, out of the land conveyed. Ground rent answering the latter description is real estate, and in case of death of the owner thereof, if there be no will, it goes to the heir and not to an administrator. The owner of the rent and the one to whom the land is conveyed subject to the rent each is the owner of a fee simple estate, the former being an incorporeal and the latter a corporeal interest.

The owner of ground rent and not the owner of the land is liable for taxes (Code, § 2245). Ground rent being real estate may be bound by judgment or mortgage. If the owner thereof purchase the land the two estates will ordinarily be merged and the ground rent estate cease or if he purchase part it will cease *pro tanto* (to that extent), yet in equity this merger is not favored and as a general rule the intention of the person owning both estates will govern as to the matter of merger, and that the intent is against the merger will be presumed where his interest is against it even though the intent be not expressed.

Arrearages of rent are a lien upon the land, but no action to recover can be brought after 10 years (Code, § 5817). Before commencement of suit to recover them they are presumed to

have been paid. Arrearages are discharged as a claim against the land by judicial sale of the land and attach to the fund raised by the sale. The owner of the rent may recover for arrearages by ordinary suit or by distress or if there is not sufficient personal property to distrain, he may peaceably or by process of law re-enter and hold the land as if by his original title, the estate of the owner being forfeited by non-payment of rent. (See Bouvier's Law Dictionary, title "Ground Rent.")

GUARANTY

- § 1. Guaranty distinguished from suretyship
- § 2. Guaranty to answer for another's debt or wrong
- § 3. Continuing guaranty
- § 4. Discharge of guarantor
- § 5. Guarantor's right to indemnity from the principal

§ 1. **Guaranty distinguished from suretyship.**—A guaranty is a promise to answer for the debt, default, or misdoings of another, which the statute (§ 5561) requires to be in writing—see *Contracts*, section 4, (4). It is distinguished from suretyship as follows: A surety is usually bound with his principal by the same instrument, execution, at the same time, and on the same consideration; he is an original promiser and debtor primarily liable from the beginning, and is ordinarily held to know every default of his principal; and unless the creditor is required, under the statute (§§ 5774-5), to sue, he is not discharged, either by the indulgence of the creditor to the principal, or by want of notice of the principal's default, no matter how much he may be injured thereby. On the other hand the contract of a guarantor is his own separate undertaking, in which the principal does not join, usually entered into before or after that of the principal, and is often supported on a separate consideration from that of the principal's contract; the original contract of his principal is not his contract, and he is not bound to take notice of its non-perform-

ance; and even where the creditor is not required, under the statute, to sue, he is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the principal's default. (Bouvier's Law Dictionary, title *Guaranty*; 76 Va. 941, 944-5.) See *Sureties*, section 1.

§ 2. **Guaranty to answer for another's debt or wrong.** See *Contracts*, section 4, (4).

§ 3. **Continuing guaranty.**—A guaranty may be for a single act or for a series of them (when it is called a continuing guaranty), for a definite or an indefinite sum or for a definite or indefinite period.

As to what is or is not a continuing guaranty, the words used should be given their natural meaning under the attendant circumstances, regard being had to the true intention of the parties. To hold a writing a continuing guaranty the intention for that purpose should be so clear as not to admit of a reasonable doubt. If the object be to give a standing credit to be used from time to time, either indefinitely or for a fixed period, the liability is continuing; but if no time is fixed and nothing indicates the continuance of the obligation, the presumption is in favor of a limited liability as to time. (3 Min. Inst. 183-6; Bouvier's Law Dictionary, title *Guaranty*.)

§ 4. **Discharge of guarantor.**—See *Sureties*, section 2.

§ 5. **Guarantor's right to indemnity from the principal.**—See *Sureties*, section 3.

GUARDIAN AND WARD

See *Minors, Infants, or Children; Parent and Child*

- § 1. Different kinds of guardians and their appointment
 - (1) Parent as guardian by nature
 - (2) Guardian appointed by parent's will
 - (3) Guardian appointed on election of infant
 - (4) Guardian by appointment of court
 - (5) Guardian *ad item*
- § 2. When guardianship ends
- § 3. The powers and duties of guardians
- § 4. When money paid to minor without a guardian

- § 5. For what a guardian is accountable
- § 6. Means to compel settlement of accounts
- § 7. Compensation of guardian
- § 8. Mode of stating guardian's yearly accounts
- § 9. Dealings between guardian and ward
- § 10. Suit by ward against guardian
- § 11. Forms under "Guardian and Ward"

§ 1. Different kinds of guardians and their appointment.

—In Virginia we have only five kinds of guardians:

(1) *Parent as guardian by nature.*—This is the father; or if he be dead, the mother (even though married again); who has the custody of the minor's person, and the care of his education, but does not include the care of his estate; though the father may be deprived of this guardianship, if unfit, and the chancery court may remove a guardian for neglect and breach of trust and appoint another.—See *Parent and Child*, section 3; 1 Minor, 452-3, 463; Code §§ 5320, 5326.

(2) *Guardian appointed by parent's will.*—This is called a testamentary guardian, because he is appointed by his father's will; or by his mother's will, if he has no other duly qualified guardian. Such guardian is for the estate only. (Code, § 5314). But the appointment is void, if the person fails to accept and qualify, within six months after the probate of the will (Code, § 5315).

(3) *Guardian appointed on election of infant.*—Where the minor is over 14, he may in person or in a writing duly acknowledged, nominate his own guardian, subject to the approval of the court; and such guardian, like any other appointed by the court, has charge of his person and estate, subject of course to the right of the father or mother to the custody of his person, as stated in (4) below (Code, §§ 5317, 5320).

(4) *Guardian by appointment of court.*—Independently of statute, a court of chancery may appoint a guardian for the person and the estate (24 Grat. 302). By section 5316, the circuit or corporation court (Chancery Court, in the City of Richmond), or judge in vacation, appoints a guardian for his custody, estate, and education. He qualifies by giving bond with good security, which if not taken the judge is liable (Code, §§ 5316-18, 5320). Where the amount of the estate is not over \$100, the court may allow bond without security

(Acts 1918, p. 469). But such appointment by the court does not deprive the father, if living, and in case of his death, the mother, while she remains unmarried, of the custody of the person of the minor, and to the care of his education; and if "either the father or the mother of an unmarried infant (i. e., minor) be dead or unable or refuse to take its custody, or has abandoned his or her family, the other shall be entitled to the custody, services and earnings of such infant" (Code, § 4320). The court of chancery may also remove a guardian for neglect or breach of trust, and appoint another in his stead, and even make "any order for the custody and tuition of an infant and management and preservation of his estate" (Code, § 5326). As to custody, see *Parent and Child*, section 3.

Where there is no guardian or until he has given bond, the court or judge may appoint a curator, who is a kind of temporary guardian and gives bond as such (Code, § 5319). A trust company may act as guardian (Code, § 4148 (e), as amended by Acts 1920, p. 551). A guardian or committee may also be appointed for a feeble-minded or an insane person (Code, §§ 1080, 1085, as amended by Acts 1920, p. 376).

(5) *Guardian ad litem*—i. e., a guardian for the purpose of defending an action or suit against a minor or insane person, appointed by the court, or judge in vacation, or the clerk. (See *Minors, etc.*, section 2.)

§ 2. When guardianship ends.—By section 5320 of the Code: "Unless the guardian shall sooner die, be removed (for neglect or breach of trust—§ 5326), or resign his trust, he shall continue in office until the minor, being a male, shall attain the age of 21 years, or being a female, shall attain that age, or (being married) a receiver be appointed under section 5136 to hold her property for her, or, in the case of a testamentary guardian, until the termination of the period limited therefor. At the expiration of his trust he shall deliver and pay all the estate and money, in his hands, or with which he is chargeable, to the person entitled to receive the same." The custody of the person at common law, ceases when he or she marries (1 Minor, 464), but by statute above, in case of a female, when she marries and a receiver is appointed.

In case of her marriage, her estate is committed to a

receiver, who holds and manages it for her, until she is 21; and if she thinks best a sale may be made of it (Code, §§ 5136-7).

A minor cannot, after 14 years of age, change his guardian—even one nominated by himself. Good cause must be shown for such change—(1 Minor, 463).

A guardian may be allowed by the court to resign after his accounts have been stated and settled according to law (Code, § 5419).

§ 3. The powers and duties of guardians.—Every guardian appointed by court or will (except one *ad litem*, who gives bond when required, has the right to “the custody of his ward, and the possession, care, and management of his estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education. But the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor, and to the care of his education. If either the father or mother of an unmarried minor be dead, or unable or refuse to take his custody, or has abandoned his or her family, the other shall be entitled to the custody, services, and earnings of such minor.” (Code, § 5320.)

At common law, a Virginia guardian has, in general, no authority outside of the State, nor has a guardian appointed in some other state or country any power here (1 Minor, 465); but now ample provision is made by statute for transferring of money or property (including national bank stock) of a minor or insane person in this State to a foreign guardian. (Code, §§ 5348-56, and Acts 1922, amending § 5349.)

A guardian can do nothing except for the benefit of the minor, called his “ward.” And, in general, his acts, even though without authority, yet if beneficial to the ward, will be protected, but if otherwise, they will be avoided. (1 Minor, 465-6, 471.)

A guardian is in no case responsible for his support and education, unless by agreement (1 Minor, 466-7).

The remedies for the abduction of a ward are the same as in the case of parent and child—see section 3, under *Parent and Child*.

As it is the duty of a guardian to protect and defend his ward, he may assist him to obtain redress for any wrong done him. And in consequence of his right to possession of his ward's estate, he may and ought to sue in his own name for any trespass or injury done to the ward's property; but to get possession at first of the ward's estate, the suit should be in the name of the minor by his next friend. (1 Minor, 466, 469.)

He cannot sell the ward's lands, save by proper proceedings in court, as specifically provided by statute, which authorizes their sale, exchange or encumbrance (Code, §§ 2609, 5335, as amended by Acts 1922, etc.); but the guardian or guardian *ad litem* must not be a purchaser, directly or indirectly (§ 5341), though a sale to him is not void, but voidable and may, in exceptional cases, be sustained (1 Minor, 470; 22 Grat. 378; 27 Grat. 33, 41; 30 Grat. 123).

He may lease the lands (1 Minor, 370); and where a minor is entitled to or bound to renew a lease, any person on behalf of such minor, or any person interested, may apply to the court and have the same done (Code, § 5334).

He is liable for "voluntary" waste done to the lands, as, cutting off the trees for the market, or exhausting the soil by improper farming, and the like, and if the waste be "wanton" (or wilful) he must pay double damages; but he is not liable for mere "permissive waste," as suffering the buildings and fences to deteriorate for want of repair, and the like (Code, §§ 5508-9; 1 Minor, 470). A minor in such case sues by next friend (§ 5531).

As to the personal estate, the guardian may sell it, but must of course account for it (1 Minor, 471); but under the present Code, while he may make disbursements of the annual income, he is not allowed to expend or disburse any of the corpus (or body) or principal of the estate without first obtaining the consent of the court (Code, § 5321), whereupon the court may order a sale of such personal property as may be necessary (§ 5322).

As stated in the statute (§ 5320), the guardian, out of the proceeds of his ward's estate, real and personal, "shall provide for his maintenance and education"; but this is limited to the annual income or profits, unless the court directs other-

wise, and if necessary orders a sale of some or all of the personal property (§§ 5320-1); and by section 5326 of the Code, a court of chancery, on a bill filed by the guardian, may order a sale of a necessary part of the real estate, where it appears "that the proper maintenance and education, or other interests of an infant, require that the proceeds of his real estate, beyond the annual income thereof, should be applied to the use of said infant;" and "to the extent that the proceeds may be so applied, they shall be deemed personal estate but no further."

It is further provided that a guardian, by proper court proceedings, may have his ward's land sold, exchanged, or encumbered, where the interests of the ward will thereby be promoted and the proceeds invested (Code, § 5335 etc.; Acts 1918, p. 414); which proceeds, or so much as remains unexpended, upon the ward's death, under age, passes to his heirs as real estate (§ 5347).

A guardian may, where proper, bind a minor an apprentice, or have him placed in an institution for destitute children (Code, §§ 5298, 5300); or have his name changed (§ 5383); or have him adopted (§ 5333 as amended by Acts 1922, p. —); or set apart a homestead for him in personal estate, if his father has not already done so (§ 6541); list his property for taxation (§ 2307, as amended by Acts 1920, p. 563; Acts 1918, p. 169); or recover damages for injury to him by another's intoxication (§ 4675).

A bank may pay any balance on deposit to the credit of a deceased person (after two weeks from his death), or of a minor, to the guardian upon presentation to the bank of a letter or certificate of his qualification as such (Code, § 4125; as amended by Acts 1920, p. 21.) A bank may pay a deceased's check within two weeks after his death (§ 5748), so it cannot pay a guardian until after that time.

§ 4. When money paid to minor without a guardian.—See section 18, under *Minors, Infants, etc.*

§ 5. For what a guardian is accountable.—Section 5320 of the Code says: "At the expiration of his trust, he shall deliver and pay all the estate and money in his hands, or with which he is chargeable, to the person entitled to receive the same."

Guardians having charge of a minor's estate are accountable for all profits which are or ought to have been received, and for all losses through his default or neglect.

Courts of equity will not hold a guardian or other fiduciary, agent, or trustee, liable for losses in managing a trust, where he acted in good faith, in the exercise of a reasonable discretion, and as he probably would have done in his own matters (Note to § 5406 of Code).

If a guardian by his negligence or improper conduct lose any debt or other money, he is charged with both principal and interest; and if he "pay any debt the recovery of which could he prevented by reason of illegality of consideration, lapse of time or otherwise, knowing the facts by which the same could be so prevented, no credit should be allowed him therefor" (Code, § 5406). So, the guardian is bound to plead the statute of limitations.

A guardian may compromise "any liability due to or from him," provided the same be approved by the court (Code, §§ 5332, 5440), which the court will do, if he acted with the same judgment and consideration as a prudent man would have done in his own affairs, as, in the case of doubtful claims, or the payment of debts illegal or unrecoverable, or the like (1 Minor, 477).

He may also submit a controversy to arbitration (Code, § 6163).

He is liable for any neglect which injures the ward's estate, as, delaying without cause the payment of a debt carrying interest; suffering a suit, when he has means to pay the demand, and has no reasonable defense; delaying to sue until the claim is barred or the debtor's insolvency. But he is not liable for goods stolen or destroyed without his fault; or where the loss occurs by the failure of a security or a bank in which common usage and belief warrant confidence. He should be very careful about personal security. The safer way is to apply to the court in term for advice about investing funds (Code, § 5430). (1 Minor, 478-9.)

He is not chargeable for the ward's services, even as a set-off to his board, unless they were such as, under the existing circumstances, the guardian ought freely to have expected to pay for (1 Minor, 480).

A guardian assenting to a ward's prostitution or fornication is guilty of pandering and punished by penitentiary from one to ten years and fine not over \$1,000 (Code, § 4579).

§ 6. Means to compel settlement of accounts.—The court is charged with the superintendence of the settlement of guardians' accounts, and the control of their conduct (Code, § 5326); and to this end the judge appoints a commissioner of accounts, who shall have a general jurisdiction of all fiduciaries (guardians, etc.) and make all *ex parte* (or one-side) settlements of their accounts. The commissioner is to get from the clerk, within 20 days after each term, a list of the fiduciaries who qualified at that term; and thenceforward, it is his duty to require them punctually to conform to the directions of the law, in respect to an inventory of the property subject to their control, an account of sales, and the periodical settlement of their accounts (Code, § 5401).

Every guardian must, within four months after qualification, and within four months after any subsequent accession of property, return to the commissioner of accounts an inventory of all estate, real and personal, which is subject to his authority; and if he fails so to do, the commissioner shall take proper steps to compel him to do it, by having him fined from \$50 to \$500 for any delinquency; and if he persists in his failure, to proceed against him for contempt of court in disobeying its order. He also must, within four months after any sale, return to the commissioner an account of sales. Both of these returns the commissioner is to inspect, and if they are in proper form, he is, within 10 days, to deliver them to the clerk to be recorded. (Code, §§ 5403-5.)

A guardian is required to settle his account annually, within six months after the end of every year, before the commissioner of accounts; and if he fails, the commissioner must take steps to compel him by having him fined from \$50 to \$500, and if need be, by a proceeding for contempt; and he also suffers a forfeiture of compensation unless allowed by the court; but this denial of compensation is not to apply where the guardian has within six months after the end of any year furnished the ward (being now adult) with a statement of the account, and settled the same with him; nor where he has laid a statement of his account before a commissioner in

chancery, upon an order of account in a pending suit (Code, §§ 5408-11).

For steps to be taken to secure the funds in the guardian's hands, if in apparent danger; and, if need be, to remove the guardian and appoint another, see Code, §§ 5416-18.

The commissioner is required to post at the courthouse on the first day of the court, or first Monday in any month (in a county), a list of fiduciaries whose accounts are before him for settlement; and no account shall be completed by him within 10 days thereafter. Anyone interested, or his next friend, may appear before the commissioner, and insist on or object to anything in like manner as if the commissioner was taking an account by order in a pending suit. The commissioner is to file report as soon as completed, and after a month the court personally examines and considers it, with objections (if any) theretofore filed, and corrects any errors appearing by exceptions or on the face of the account, and to this end may re-commit the report to the same or another commissioner, and may, even have a jury impaneled to try a question of fact; or the court may confirm the report in whole or in part. When confirmed, the report is recorded, and thenceforward is taken *prima facie* to be correct, subject, however, to be re-opened, examined, and corrected by a suit in due time for the purpose. And when the report shows money in the guardian's hands, the court may order payment to whom due, or that it be invested, loaned or otherwise disposed of. (Code, §§ 4526-33.)

§ 7. Compensation of guardian.—Section 5425 of the Code says, the commissioner in stating and settling the account, shall allow the guardian "any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission (on receipts), or otherwise"; and counted as receipts are bonds which the guardian might rightfully have collected, but did not and ultimately turned over to the ward as money; or mortgages taken for bonds or other debts, which he turns over to the ward; and of course money on hand at the start, proceeds of crops or of anything rightfully sold. The amount of compensation depends on the time, trouble, and pecuniary responsibility in the particular case, with some reference to the value of his services to the ward. "Reason-

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able compensation" is usually fixed at 5 per cent., but it may be less or more; $7\frac{1}{2}$ and even 10 per cent. has been allowed, where the estate was troublesome to manage, and the money received but little (1 Minor, 489-90).
A guardian has no commission on debts due by himself to the ward; and can charge on the same capital but once, though the investment be changed, but after being once allowed on the principal, he charges only on the income. (1 Minor, 490-1.)

§ 8. Mode of stating guardian's yearly accounts.—An account is made up for each year, and a balance struck. They embrace the receipts on one side and the disbursements on the other. No interest is usually calculated on the individual items on either side, even though the receipts may have been early, and the disbursements later or *vice versa*, except indeed the amount be large. The balance being struck for the year, it bears interest the next year. A guardian is allowed 60 days to invest or loan money and shall not be charged with interest until after said time, unless he has invested or loaned it before (Code, § 5325).

Where there is an annual balance in favor of the ward (including interest), remaining in the guardian's hands, interest is charged thereon for the next year (Code, § 5323); but if the balance is in favor of the guardian, interest is not allowed upon so much thereof as is interest or were estimated or conjectural amounts (1 Minor, 486-7); yet he may recover compound interest on any bond, note or other instrument of writing, as therein stipulated (Code, § 5324). From the end of the wardship, the account is settled on the ordinary principles of debtor and creditor; as to interest, compound interest being excluded on both sides (1 Minor, 487).

A guardian is allowed in his account any debts properly paid; reasonable expenses, such as clothes, education, and other needful personal expenses of the ward; reasonable attorney's fees; taxes; wages of laborers and other expenses incident to farming his lands; repairs and suitable and beneficial improvements to his houses, etc.; and where necessary, clerk's hire, rent of office, postage, etc. (1 Minor, 487).

If the father be living, and of ability, he must support the ward; and the guardian is not allowed therefor; but the court may, upon application of the father, direct the minor's

estate to be applied to his support, where, under all the circumstances, it appears proper (1 Minor, 488).

The guardian should take vouchers or receipts for disbursements, or else, in some cases (as for postage, traveling expenses, etc.), make affidavit of the payment (1 Minor, 488).

For form of stating a guardian's account, see 1 Minor, 496-500.

§ 9. Dealings between guardian and ward.—A guardian is not allowed to deal with the subject-matter of the trust, for his own benefit, such transactions being always voidable by the ward though binding on the guardian, unless avoided by the ward. Likewise a guardian's private settlement with his ward is always scrutinized with rigor; and a release without a settlement, especially soon after the ward attains his age, however fair it may be, may be avoided by the ward. So also a conveyance from a ward to a guardian, made soon after attaining age, and without a settlement of accounts, may be set aside by the ward. (1 Minor, 492.)

§ 10. Suit by ward against guardian.—Suit may be at law or in equity upon the guardian's official bond, or against the guardian alone, in the ward's name by his next friend, or, after his majority, by himself alone (1 Minor, 494); or an action of account may be brought against his personal representative (Acts 1920, p. 28).

But the suit on the bond must be within 10 years from the ward's majority or from the termination of the guardian's office, whichever shall happen first (Code, § 5811); but where the suit is against the guardian alone, or his representative, on the ground of the trust arising out of his fiduciary relation, the limitation does not apply (§ 5811), and the doctrine of *laches* (or long delay) and stale demands applies, the court usually fixing the limitation at 20 years.

§ 11. Forms under "Guardian and Ward."—

NO. 1. MEMORANDUM OF FACTS BY COUNSEL ON MOTION FOR APPOINTMENT OF GUARDIAN.

(Va. Code 1919, § 5316; 3 Pollard's Code 1910, p. 332.)

Date, _____ 192—

1. Full names of infants, with ages _____

2. Place of residence and color of infants _____
3. Names of both parents, and whether living or deceased _____

4. Full name and residence of Guardian nominated _____

5. Name of person making motion and grounds of being entitled to
make it _____

6. Value of infant's personal estate, _____ \$ _____
7. Value of infant's real estate, _____ \$ _____
8. Total value of real and personal estate _____ \$ _____
9. Annual net rental value of real estate _____ \$ _____
10. Full name of surety offered _____
11. Bond of Guardian (to be fixed by Court) _____ \$ _____

Signature of Counsel.

**No. 2. NOTICE OF APPLICATION TO USE PART OF CORPUS OF WARD'S ESTATE
FOR HIS SUPPORT.**

(Code, § 5321; P's Code Biennial, p. 24.)

In the _____ Court of _____,
_____, Guardian,
of _____,
vs.

To _____,

Take notice that I shall, on the _____ day of _____, at _____ o'clock a. m. or as soon thereafter as the attention of the Court may be obtained, petition the _____ Court of _____ for permission to use part of your estate for your maintenance and support as follows: \$ _____ per month to be paid by the undersigned as guardian to the undersigned in her personal capacity to be used for your maintenance and support, the said petition being made in pursuance of section 5321 of the Code of Virginia, and copy of said petition is hereto attached and made a part of this notice.

_____, Guardian.
State of Virginia, _____ }
_____ of _____ } to-wit:

This day personally appeared before me, _____, a Notary Public in and for the State and _____ aforesaid, in my said _____, who being first duly sworn, made oath that he did on the _____ day of _____, serve on _____ in person in the _____ of _____ where she resides, true copies of the above notice and of the petition hereto attached.

Given under my hand this _____ day of _____.

_____, Notary Public.

We accept service of the above notice and petition and consent to the entry of an order for the use of the corpus of the estate of _____ for her support and maintenance in accordance with prayer of said petition.

This notice may be served by any person other than the guardian.

No. 3. PETITION IN ABOVE CASE.

(*Idem.*)

In the _____ court of the _____, _____,
_____, Guardian
of _____, and

vs.

_____ To the Honorable _____, Judge of the said Court:

Your petitioner, _____ Guardian of _____, her infant child, represents that she was duly appointed guardian of the estate of her only child, _____, by order of this Court entered on the _____ day of _____, _____.

That your petitioner was left a widow by the death of her husband on the _____ day of _____, _____, and the only estate left by her said husband, _____, was a life insurance policy in the amount of \$_____; that your petitioner qualified as administratrix, collected said insurance, paid all debts, and has made a final settlement of her accounts as such administratrix before the Commissioner of Accounts, and has paid to herself as guardian the sum of \$_____, the portion of the estate belonging to her said ward, _____.

That your petitioner has no property of her own and received nothing from her husband's estate except the small sum of \$_____, and commissions as administratrix in the sum of \$_____, and being in delicate health is able to do only light work for a livelihood and in addition to that her time is taken up to such an extent in the care of her child the said _____, a girl of only _____ years old, that she will be for some years handicapped in earning a living for herself and her child even if she were of more robust health.

That the needs of your petitioner's ward, in the way of food, clothing, attention of physician, medicines and other necessities are such, in view of the present cost of necessities, the child's age and health, as to be beyond the means of your petitioner to supply them without recourse to the estate of the said ward, the income of which is wholly inadequate to meet the said requirements, and your petitioner alleges that those requirements are such as to make it necessary that she have from the estate of the said ward the sum of not less than

§——— a month to meet the minimum requirements of her said ward.

That this petition is filed in pursuance of section 5321 of the Code of Virginia and after notice duly served in accordance with said section upon her said ward as shown by said notice hereto attached, due service of which is thereon shown more than 5 days before the filing of this petition.

In consideration whereof, and for as much as your petitioner is remediless save in a court of equity, your petitioner prays that her said ward, ——— be made a party defendant to this petition, that a guardian *ad litem* be appointed to protect the interest of the said ward, that she be required to answer by said guardian *ad litem*, but not under oath, answer under oath being hereby expressly waived, and that an order be entered by this court after hearing hereon permitting and directing your petitioner as guardian of ——— to pay to your said petitioner in her personal capacity and as mother of the said ——— §——— per month beginning with the month of ———, ——— and until the further order of this court, out of the corpus of the estate of the said ———, and that your petitioner may have all such further and general relief as the nature of her case may require or to this court shall seem meet. Your petitioner will ever pray, etc.

Petitioner.

Counsel.

State of Virginia. }
City of Richmond, } to-wit:

This day personally appeared before me, ———, a Notary Public in and for the State and City aforesaid, in my said City, ——— who subscribed the foregoing petition as Guardian and made oath that the statements therein contained are true, except where stated to be upon information and where so stated she believes them to be true.

Given under my hand this ——— day of ———, ———.

Notary Public.

No. 4. ANSWER OF GUARDIAN AD LITEM.

(*Idem.*)

In the ——— court of the ———, ———.
———, Guardian
of ———, }
and ———, } Answer of ———
vs. } by Guardian *ad Litem*.

The separate answer of ———, an infant under the age of 21 years, by ———, her Guardian *ad Litem* appointed to defend her in this proceeding, to the petition and application filed by

_____, Guardian of _____, and in her personal capacity, against her, petitioning for an order permitting the use of a part of the corpus of the estate of the said _____ for her support and maintenance, in the _____ Court of _____.

This respondent, reserving to herself the benefit of all just exceptions to the said petition and application, for answer thereto, or to so much thereof as she is advised that it is material she should answer, by her said Guardian *ad Litem*, answers and says:

That she is an infant of tender years, and by reason of her infancy is incapable of understanding or of taking care of her rights and interests herein; and that she therefore commends herself and her rights and interests to the protection of the Court, and prays that no decrees or orders may be entered that will tend to her prejudice.

And now having fully answered the said petition and application, this respondent prays to be hence dismissed with her reasonable cost by her in this behalf expended.

Guardian *ad Litem* of _____,
Respondent.

No. 5. ORDER IN ABOVE CASE.
(*Idem.*)

Virginia:

In the _____ Court of _____.
_____, Guardian
of _____
vs.

This day appeared _____, Guardian of _____ and in open court and filed a petition and application, verified by petitioner's affidavit, for an order for permission to use part of the estate of _____, the ward of the said _____, for the support and maintenance of the said ward, said application being filed after due notice served more than five days before the filing of the said application on the said _____ as shown by copy of said notice attached to said petition. _____ a discreet and competent attorney at law is appointed Guardian *ad Litem* to defend the interests of the said _____ in this matter, and thereupon the said Guardian *ad Litem* filed his answer to which the petitioner replied generally.

And then this matter coming on to be heard on the petition of _____, Guardian of _____ in her personal capacity, on the copy of notice showing due service more than five days before the filing of this application on the answer of _____, Guardian *ad Litem* of the said _____, ward, on the oral testimony in open court of _____ and _____, and was argued by counsel.

On consideration whereof it appearing from the petition, and oral testimony taken in open court, that it is proper that a part of the corpus of the estate of _____, infant child of three years of age,

be used for the support and maintenance of the said infant ward, that it is convenient and proper that the part so consumed be paid at reasonable intervals to _____, the mother of the said _____ to be used by her to meet the needs of her said ward and child, that \$_____ a month is a reasonable and proper amount to be used from the ward's estate for such purpose, that the said guardian and _____, surety on the bond of the said guardian exercise a joint control over the estate of the said ward and has to sign all checks, it is. therefore, adjudged, ordered, and decreed that _____, Guardian, and _____, surety, do pay to _____ at reasonable and convenient intervals out of the estate of the said _____, ward and infant child of the said _____, \$_____ per month beginning _____. _____ to be used by the said _____ for the support and maintenance of the said _____; that it will not be necessary for the said _____ to account in detail for the money so received by her and this order is to continue in effect until the further order of this Court.

No. 6. FORMS FOR SALE OF MINOR'S LAND.

(See under *Minors, Infants, or Children.*)

